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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Louisville and Nashville Railroad Company (herein "L&N" or "the Company"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 16, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 505 F.2d 610. The opinion of the District Court is reported in 368 F.Supp. 633. Those opinions are set forth respectively as Appendices I and II to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered December 16, 1974, and rehearing was denied on January 30, 1975. A copy of the Order denying rehearing is set forth as Appendix III to this Petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Circuit Court correctly held, contrary to the holdings of the Courts of Appeal for the Eighth and Sixth Circuits, that the Equal Employment Opportunity Commission (hereinafter "EEOC" or "Commission") may ignore its regulation set forth at 29 C.F.R. §1601.23 (1972) requiring the EEOC, upon its determination that conciliation has been unsuccessful, to notify respondents to charges under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e (hereinafter the "Act") that conciliation may be "resumed . . . upon the respondent's written request within the time specified in such Notice." 29 C.F.R. §1601.23.

2. Whether the Circuit Court correctly held that the Act contains no limitation on the time within which the EEOC may institute an action under §706 (f) (1) of tne Act.

3. Whether the standard to be applied in determining EEOC compliance with the conciliation requirements of §706 (f) (1) of the Act is different than the standard applied in determining compliance by the Department of Labor with virtually identical requirements of §626 (b) of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

STATUTES AND REGULATIONS INVOLVED

Section 706 (f) (1) of the Act provides, in relevant part:

> "If within thirty days after a charge is filed . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . If . . . within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person . . . and within ninety days after . . . such notice a civil action may be brought against the respondent . . . by the person claiming to be aggrieved."[1]

The relevant EEOC regulation, 29 C.F.R. §1601.23, provides:

> "Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the *respondent shall be notified promptly, in writing, that such efforts have been unsuccessful* and will not be resumed except upon the respondent's written request *within the time specified in such notice.*" (Emphasis supplied.)

The relevant portions of the EEOC Internal Procedure Manual provide:

> "SECTION 66
>
> UNSUCCESSFUL CONCILIATION EFFORT
>
> 66.1 *District Director Must Notify R of Termination of Conciliation Effort* — After determining that a conciliation effort has been unsuccessful or if R fails or refuses to confer, the District Director will notify R by letter, return receipt requested, that the Commission has terminated its efforts to conciliate and that conciliation will not be resumed unless R specifically

[1]This section has been edited to fit the procedural context of this case.

requests resumption in writing within the time limit specified by the District Director. See section 1601.23 of Commission's Procedural Regulations which states:

> 'Should a Respondent fail or refuse to confer with the Commission or its representatives, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the Respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the Respondent's written request within the time specified in such notice.'

66.2 *CP to be Notified of Unsuccessful Effort* — After expiration of the time limit specified in the District Director's letter of notification (see 66.1) CP is to be informed that the conciliation effort was unsuccessful and informed of all pertinent rights under the Act."[2]

The relevant portion of the Age Discrimination in Employment Act, 29 U.S.C. 626 (b) provides that:

> ". . . Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

This action began April 27, 1960, when Ben Thomas, a black male, filed a charge with the EEOC alleging simply that

> "I was discharged because of my Negro race by the Louisville and Nashville Railroad Company." (A. 56).[3]

[2]"R" and "CP" refer respectively to "respondent" and "charging party".

[3]References to the consolidated Appendix utilized in the Court of Appeals, which has been certified to this Court at Petitioner's request, will be indicated as (A. ___).

On the basis of its investigation (A.57) of this charge the EEOC District Director issued "Findings of Fact" on November 24, 1970 concluding that:

> "I do not find that race was a factor in the discharge . . . ."

The Commission agreed with that conclusion,[4] but with no further investigation, and with no complaint before it, found "probable cause" to believe that the Act had been violated in two respects: First, since the L&N had at some point in time inquired of employment applicants relative to arrest records, it followed that

> "Notwithstanding the fact that, in the instant case, the only employees shown to be adversely affected . . . are Caucasians, it is well known that Negroes are arrested substantially more frequently . . . ." (A. 64).

Secondly, the Commission administratively presumed, with no complaint of discrimination and no indication of any adverse effect on any applicant or group of applicants, that the mere existence of preemployment "tests" violated "the Act." (A. 65).[5]

On the basis of those administrative conclusions the Commission advised the L&N that it had found "the charge is true in part" (A. 62),[6] and that "conciliation" was in order. The L&N met with an EEOC conciliator on March

[4]Thomas had been employed by the L&N on April 28, 1968 as a "Cub Switchman" and by the time of his discharge for falsifying his employment application, had progressed to "switchman". Thomas did not except to the Commission's adverse determination nor did he institute suit following receipt of his "notice of right to sue" on May 31, 1972. Thus, the initiator of this litigation has disappeared for purposes of this case.

[5]The Commission based its authority to deal with such issues, even absent a "charge", on *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) where the Court held that the scope of a judicial complaint in an individually instituted action is limited to the scope of the "EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F.2d at 466.

[6]The only charge involved was that by Ben Thomas, set forth above in *haec verba*.

9, 1972 (A. 39). The L&N attempted to point out that it had never been afforded an opportunity to "present its side of the case" as to the issues on which the findings of "probable cause" were based, only to be advised that "there could be no discussion relating to the reasons or bases of the Commission's Decision". (A. 39).[7] The EEOC official presented the L&N a proposed conciliation agreement which the L&N took under consideration. On April 9, 1972, the conciliator was advised by the L&N that the proposal was under active consideration and was asked to contact the L&N if "he had any questions" prior to receiving a definitive corporate response.

On May 31, 1972, in the midst of what the L&N considered "ongoing efforts at conciliation" (A. 40, 68) the EEOC advised the L&N that it was notifying Ben Thomas of his "right-to-sue" and expressed regret "that a satisfactory settlement was not reached." (A. 67). It is undisputed that no other notice was given the L&N of the termination of conciliation efforts nor was it advised of a specified time within which it could request resumption of conciliation efforts as required by 29 C.F.R. §1601.23. Instead, the Commission's next contact with the L&N was the filing of the instant action on July 16, 1973, over 37 months after Thomas filed his charge, and over 13 months after the Commission issued notice to Thomas of his "right to sue."[8] The post-suit efforts of the L&N to resume "conciliation", including invocation of the statutorily created 60-day stay

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[7]The Agency regulations provide, in part, that "As a part of each investigation . . . the respondent shall . . . be offered an opportunity to submit a statement of its position or evidence with respect to the allegations." 29 C.F.R. § 1601.14. This procedural protection is of vital importance where, as in the Fifth Circuit, the Commission's decision has been held to be admissible at trial and is "highly probative of the ultimate issue involved . . . ." *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972).

[8]The EEOC has never offered any explanation for its delay.

for conciliation efforts, were opposed and frustrated by the EEOC. (A. 15-26).

The district court granted the L&N's Motion for Summary Judgment on the dual grounds that the Commission had failed to file suit within the 180-day time limit inherent in §706 (f) (1) of the Act, and because the EEOC had clearly failed to comply with its own regulation, 29 C.F.R. §1601.23.

The Court of Appeals, with Senior Judge Moore of the Second Circuit (sitting by designation) dissenting, held, first, that there is no time limitation on the right of the EEOC to bring suit under §706 (f) (1), and secondly, that the Agency is not required to comply with 29 C.F.R. §1601.23 since it did comply with a different regulation, 29 C.F.R. §1601.25 which governs issuance of notices of "right to sue".[9]

REASONS FOR GRANTING THE WRIT

There exist at least three substantial reasons for granting the writ.

(1) The Decision Below Creates an Irreconcilable Conflict Between the Fifth Circuit, and the Sixth and Eighth Circuits

On December 11, 1974, less than a week prior to the decision below, the Eighth Circuit decided *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974), (a copy of which is attached as Appendix IV), involving the iden-

[9]It is clear, as will be discussed *infra*, that §1601.23 and §1601.25 of the EEOC regulations, 29 C.F.R. §1601.23, 1601.25, are sequential steps in an integrated regulatory framework and that each serves a distinct, non-interchangeable function designed to encourage and exhaust the possibilities of conciliation as the preferred method of achieving compliance with the Act. Section 1601.23 informs the Respondent that it has a "last chance" to conciliate while §1601.25 notifies all parties that the Commission's efforts are terminated.

tical issue of the necessity of the Commission complying with 29 C.F.R. §1601.23. That court affirmed dismissal of a similar action on the basis that the Agency had failed, as it did here,[10] to issue the notice required by §1601.23. There, as here, the Commission admitted non-compliance. The only significant distinction is that in *Hickey-Mitchell*, supra, the employer flatly refused to enter into any conciliation discussions with the Commission while the L&N did meet with the Agency and was seeking to function within the statutory framework. In *Hickey-Mitchell*, the Agency argued that its non-compliance was an immaterial "technical" defect in view of that employer's announced unwillingness to conciliate, while it argued below that compliance was unnecessary because the L&N, as a cooperative respondent, was not entitled to "last chance" notice. The Eighth Circuit recognized, as did the dissenting judge below, that conciliation remains "the primary mode of enforcement", 507 F.2d at 948, of Title VII and that 29 C.F.R. §1601.23 "affords *even* the most uncooperative and recalcitrant respondent 'the right to be told that it has one last chance to attempt conciliation.' " 507 F.2d at 948. The Eighth Circuit, as opposed to the Fifth Circuit, and in accord with many district courts,[11] held that the regulation confers an important procedural right on respondents[12] and "reflects

[10]It appears to be standard EEOC practice to ignore §1601.23. See, e.g., *EEOC v. Firestone Tire & Rubber Co.*, 366 F.Supp. 273 (D.Md. 1973); *EEOC v. Western Electric Co.*, 364 F.Supp. 188 (D.Md. 1974); *EEOC v. General Dynamics Corp.*, 382 F.Supp. 59 (N.D.Tex. 1974); *EEOC v. U. S. Pipe & Foundry Co.*, 375 F.Supp. 237 (N.D.Ala. 1974).

[11]See, footnote 10, supra.

[12]See, e.g., *EEOC v. Firestone Tire & Rubber Co.*, 366 F.Supp. 277 (D. Md. 1973): "Where agency rules are intended to confer important procedural benefits . . ., those rules must be scrupulously observed."; *EEOC v. Western Electric Co.*, 364 F.Supp. 188 (D.Md. 1974). See also, *American Farmlines v. Black Ball Freight Service*, 397 U.S. 532, 538-539 (1970); *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *U. S. v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969); *EEOC v. Westvaco Corp.*, 372 F.Supp. 985 (D.Md. 1974).

formal recognition of the need to keep the doors of communication open", for "compliance with the regulations, . . ., may well give pause to the most theretofore recalcitrant employer" and "lead to a resolution of these disputes in the Congressionally preferred forum."

Subsequently, the Sixth Circuit, in *EEOC v. Kimberly-Clark Corp.*, ... F.2d ....., 10 FEP Cases 38 (6th Cir. 1975), quoting the district court below, said that §1601.23 notice

> "[G]ives an employer one last chance to alter its position with regard to the issues being discussed during conciliation with the knowledge that the statutory scheme provides for litigation as the next step. *EEOC v. Louisville & Nashville R.R.*, 368 F.Supp. 633, 638, 6 FEP Cases 1265 (N.D.Ala. 1974), rev'd 8 FEP Cases 1316, No. 74-1185 (5th Cir., Dec. 16, 1974)." *EEOC v. Kimberly-Clark Corp., ibid.* at 45.

There, three sets of charges were pending involving "substantially identical" issues. Conciliation was unsuccessful as to all three sets. While the EEOC gave "notice" as to two sets, it failed to do so as to the third. The employer's contention that this failure to comply with §1601.23 barred the action was rejected by the Sixth Circuit. That Court reasoned, on the facts of that case, that the Agency's neglect "to follow a procedural rule," inflicted "no significant injury" on the employer since it did receive the appropriate notice as to two of the three groups of charges, and therefore the EEOC "error should be considered harmless."

The reasoning of the Sixth Circuit, applied to the facts of the instant case, leads inexorably to the conclusion that here the EEOC "error" did inflict "significant injury" and "prejudice" to the L&N which was never afforded the notice required by §1601.23 as to the only charge against it.

While the Sixth and Eighth Circuits adopted the reasoning and language of the district court below, the Fifth Cir-

cuit rejected that holding, virtually without discussion, apparently on the basis that notice under §1601.25 eliminates the necessity of the "last chance" notice required by §1601.23.[13]

There is no doubt that the EEOC complied with §1601.25, but that is not to be equated with the requirement of §1601.23 that the respondent be given written notice allowing resumption of conciliation upon request "within the time specified in such notice" 29 C.F.R. §1601.23 (1972), a function not served by §1601.25 notice. The EEOC regulations relating to the conciliation procedures are clearly sequential rather than redundant as the Court below held. 29 C.F.R. §1601.23, provides, as the Sixth and Eighth Circuits and the district court below termed it, "last chance" notice while 29 C.F.R. §1601.25 provides for a subsequent notice upon actual termination of conciliation. The Agency's Internal Procedures Manual,[14] supports the interpretation of the Sixth and Eighth Circuits, but not that of the Fifth Circuit, requiring as it does, that §1601.25 notice be given simultaneously with issuance of a "right to sue" notice to a charging party "[a]fter expiration of the time limit specified" in the §1601.23 notice. The decision of the Fifth Circuit effectively removes these procedural encouragements to conciliation while the conflicting decisions of the Eighth and

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[13] "The Commission's notice of failure to conciliate, which included a copy of the right-to-sue letter it issued the Charging Party, was completely adequate and in conformity with its regulations. 29 C.F.R. §1601.25 (1972)." (Emphasis supplied.) 505 F.2d at 617.

[14] "66.1 After determining that a conciliation effort has been unsuccessful . . .; the District Director will notify R [Respondent] by letter . . . that conciliation will not be resumed unless R specifically requests in writing *within the time limit specified* by the District Director. . . . . 66.2 . . . *After expiration of the time limit* specified in the . . . letter notification (see 66.1) CP [Charging Party] is to be informed . . . pertinent rights under the Act."

Sixth circuits reinforce the intent of the Act to foster conciliation.

The conflict between these Circuits, and district courts in other Circuits and the Fifth Circuit, is a matter affecting the effective implementation of the Act. As the House sponsor of the 1972 Amendments to Title VII noted:

> "Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal District Courts . . . ." 119 Cong. Rec. 7563 (1972).

The Commission's regulations and its Internal Procedure Manual, explaining the operation of §1601.23 expressly recognize the central role of conciliation and the right of a respondent to be afforded a fixed period in which to request resumption of conciliation. The Agency's "error" is not a merely "technical" omission, but one which removes from the processes of the Act what should be an effective inducement to conciliation.[15]

The issue of whether the Agency must abide by regulations which confer important procedural rights affects every respondent to a charge under Title VII and the conflict among circuits should be resolved as expeditiously as possible by this Court.[16]

(2) The Decision Below Presents An Issue of Critical Importance In the Administration of the Act

In holding that there is no time limit on the Commission's right to sue, the decision of the Fifth Circuit: (1) seri-

[15]As discussed at length, *infra*, an agency is bound to advise a conciliation respondent of the imminence of agency litigation, and to exert more than a perfunctory effort toward conciliation. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

[16]The EEOC did not seek rehearing of the Eighth Circuit decision, nor was that mandate stayed to allow the Agency to petition for certiorari; neither did the Agency appeal the district court decisions in *Firestone*, *Western Electric*, or *Westvaco*, supra, all consistent with the Eighth Circuit opinion. Thus, this case affords the only available vehicle for resolving this important issue.

ously impedes effective administration of the Act by encouraging delay to the prejudice of charging parties and respondents contrary to Congressional intent; and (2) creates serious inconsistencies and anomolies in the internal construction of §706 (f) (1).

In enacting the 1972 amendments to the Act, Congress was vitally concerned with expediting, not further delaying, the elimination of discrimination in employment through the effective, expeditious enforcement of the Act.

The Dissenting Judge, and the District Court below, as have a number of district courts, held that §706 (f) (1), which conferred "suit" power on the Agency, contains within its terms a limitation on the time within which the Agency must file suit. The Eighth Circuit, in analyzing this section of the Act in the context of the commission's right to simultaneously maintain an action where suit had been instituted by an individual, summarized the statutory procedure as follows:

> "1. A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
>
> 2. If the Commission finds reasonable cause to believe that the charge is true, and conciliation attempts prove unsuccessful, the Commission may bring suit against the respondent within 180 days of the filing of the charge. The charging party shall have the right to intervene in the Commission's suit.
>
> 3. If the Commission fails to file an action within 180 days, it shall notify the charging party.
>
> 4. Within 90 days after receipt of notice, the charging party may bring a civil action against the respondent. Should a private action be brought, the Commission may intervene, in the discretion of the court, upon certification that the case is of general public importance." *EEOC v. Missouri Pacific R.R. Co.*, 493 F.2d 71, 74 (8th Cir. 1974).

Judge Moore of the Second Circuit, sitting by designation, agreed in his dissent below with this Eighth Circuit analysis and, adopting the reasoning of the district court, went the next logical step and rejected the contention of the Agency that it is now and will continue to be empowered *ad infinitum* to bring suit on *any* charge filed since the effective date of the Civil Rights Act of 1964. The issue has divided district courts[17] and is of monumental importance to the administration of the Act, both to those who look to it for protection, and to those who may, in 1980, find themselves defending a suit predicated on discrimination alleged to have occurred in 1965. It is the position of the Agency, and one which the majority below and the Fourth and Sixth Circuits have accepted,[18] that there is absolutely no time limitation on the suit power conferred by §706 (f) (1).[19]

We suggest that the Fifth Circuit majority and the Fourth and Sixth Circuits erred in their interpretations of the Act and in so doing have seriously impeded the effective, expeditious enforcement of Title VII. As the majority noted, the legislative history is in many respects unclear. That history is, however, crystal clear in demonstrating that the overriding concern of Congress in granting the Agency "suit" authority rather than "cease and desist" authority similar to that held by the National Labor Relations Board was the conviction that

> "Empowering the EEOC to bring court suits will greatly facilitate its ability to implement the law without delay . . . ." Report of the House Committee on

[17] *EEOC v. Kimberly-Clark Corp.*, ____ F.2d ____, 10 FEP Cases 38 (6th Cir. 1975).

[18] *EEOC v. Cleveland Mills*, 502 F.2d 153 (4th Cir. 1974). cert. den. ____ U.S. ____ (1975).

[19] That the Commission is pursuing stale charges is clear. In *Kimberly-Clark*, supra, one of the charges on which suit was based was filed in 1969, thus, damages are recoverable from 1967.

Education and Labor June 2, 1971, "The Equal Employment Opportunity Act of 1972", BNA, 213.

As the Dissenting Judge below noted, § 706 (f)

> "[M]ust be read and interpreted with a view toward the broad Congressional purposes underlying Title VII — that prompt, efficient methods be enacted and utilized to eradicate racial and sex discrimination in employment." 505 F.2d at 618.

The majority decision, rather than effectuating that Congressional policy, removes the only goad to expeditious Agency action and creates an anomolous statutory scheme. The analysis of the majority below and that of the Fourth and Sixth Circuits overlook a key element in the statutory enforcement design. Section 706 (f) (1) provides, inter alia, that

> "if within one hundred eighty days from the filing of such charge . . ., the Commission has not filed a civil action . . ., the Commission *shall so notify* the person aggrieved and within ninety days after the giving of such notice a civil action *may* be brought . . . by the person claiming to be aggrieved." (Emphasis supplied.)

The majority analysis requires that the mandate that notice "shall" issue after 180 days be reduced to a precatory directive that the Commission "may" issue notice. The Fifth Circuit has, however, held that the provisions that the individual "may" bring suit is in fact a jurisdictional limitation on the aggrieved individual's right of action and he "shall" sue within the statutory time frame or be barred. *Genovese v. Shell Oil Co.*, 488 F.2d 85 (5th Cir. 1973). The majority thus rewrites the provision so that "*shall* so notify" becomes "*may* so notify" while "may be brought" becomes "must be brought", all so that the Commission need not carry out the Congressional purpose that it expedite its handling of matters entrusted to it.

We suggest that the Eighth Circuit's analysis of the statutory scheme, as extended to its next logical step by the Dissenting Judge below represents the only reasonable interpretation of the section consistent with the Congressional purpose. Thus, the Commission is given thirty days to investigate a charge and another 150 days to achieve conciliation or file suit. If it does neither, then it "shall" notify the charging party who may, within 90 days, bring an action. If that action is brought, then on a very limited basis, the Commission may intervene. The Commission is thus enjoined to treat its cases with dispatch so that an aggrieved individual or group may obtain meaningful and prompt relief.

Furthermore, the effectiveness of "conciliation" is enhanced, not impeded, by recognition of a time limitation, for as the Dissenting Judge noted, "an imminent deadline, and in particular the pendency of a lawsuit, is apt to make even the most hard-line bargainers soften their position." 505 F.2d at 619.

The majority decision requires a tortured reconstruction of the statute and is at variance with the Congressional purpose. The issue is of obviously vital importance to the effective administration of the Act and requires resolution by this Court to resolve the anomolies implicit in the majority interpretation and to prevent continued inaction by the Agency to the detriment of charging parties and the prejudice of respondents.[20]

[20]At the end of fiscal 1974, there existed a backlog of over 97,000 charges at the agency, an increase over the 1973 backlog of over 19,000 charges. Over 47,000 charges were over one year old as of May 31, 1974, and 20,735 were over two years old. Source: Testimony of then EEOC Chairman John Powell before the House Subcommittee on Equal Opportunities of the Committee on Education and Labor on September 17, 1974. U. S. Government Printing Office, Washington, 1975, pp. 18, 31. Both Congress, the charging parties, and the respondent unions and employers are vitally concerned with expeditious agency action.

(3) The Majority Decision Creates Conflicting Standards in the Administration of Substantially Identical Acts

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq. charges the Department of Labor with elimination of employment discrimination based on age. The Secretary of Labor, under §626 (b) of that Act, like the EEOC under Title VII, is directed, "before instituting any action" to "attempt to eliminate the discriminatory practice . . . and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion." 29 U.S.C. §626 (b). In *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974), the Court affirmed a district court holding (362 F.Supp. 1156) that the Secretary of Labor had failed to comply with this statutory directive. The court held that "two personal meetings and one telephone call" by the Agency with the employer did not constitute substantial compliance with the Act, noting that "[i]nstead of actively pursuing resolution of the conflict, the Secretary let the case lay dormant for almost four months and filed this present action." The district court also held that the Secretary failed in his obligations by not advising the employer that the case was "being referred to the Secretary for review and possible legal action." The Circuit Court adopted the reasoning of the district court that

> "[v]oluntary compliance through conciliation, conference and persuasion is more likely to be effected when the employer clearly understands that the matter will proceed at a level beyond that of the compliance officer if there is not a voluntary resolution of the dispute." 495 F.2d at 375.

Here, not only did the Agency not indicate any intention to sue, but its internal regulations absolutely prohibited

such advice.[21] The panel decision thus creates a dual standard: where the complained of discrimination is predicated on age, the enforcing agency must affirmatively seek to conciliate, must not let matters "lay dormant", may not rest with "two personal visits and a telephone call", and must notify the respondent of the possibility of agency litigation; but if race, sex, religion or national origin is the alleged predicate, the duty to conciliate, framed in almost identical terms, is satisfied by cloaking the possibilities of litigation in secrecy, terminating conciliation efforts in midstream after one meeting (A. 39-40), allowing a case to "lay dormant" 13½ months, and then adamantly resisting efforts to reinstate conciliation despite a court order that it do so. (A. 15-16; 43-45).

The panel majority did not deal with the dichotomy created by its holding vis-a-vis the parallel provisions of the Age Discrimination in Employment Act. We suggest that there is no sound basis for the creation of incompatible standards where two acts are identical in intent, involve virtually identical terms and differ only in the identity of the enforcer. "Conciliation" as a method of dispute resolution should carry the same meaning and be subject to the same standard without reference to whether the alleged discrimination is predicated on race or age.

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[21]The pertinent portion of the EEOC Internal Procedure Manual provides, inter alia,

> "66.3 *Do Not Inform Parties of Referral to Litigation* — Under no circumstances is GP or any other party-in-interest to be informed that an unsuccessful conciliation has been referred to the Commission with a recommendation for litigation . . . ."

[22]That genuine conciliation efforts, as opposed to the process utilized in the instant case, can be successful is demonstrated by the experience of the Department of Labor under A.D.E.A. where, in 1971, conciliation was achieved in 90% of its cases. See, *Brennan v. Ace Hardware, ibid.* at 375. A compatible standard might well reduce the EEOC backlog discussed at footnote 20, supra.

We suggest that the Eighth Circuit, contrary to the Fifth Circuit, applied the correct standard, and that the inconsistent interpretation of virtually identical statutes creates impermissible distinctions among the classes of employees protected by the Acts.

CONCLUSION

For the reasons set forth above, we respectfully petition that this Court issue its Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

This is to certify that on this ..... day of April, 1975, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for the Respondent and on the Solicitor General of the United States by depositing the same in the United States Mail, with airmail postage prepaid, and addressed respectively to Ms. Debra A. Millenson, Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506; The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

ROBERT MCD. SMITH

APPENDIX I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant-Appellee.
No. 74-1185.

United States Court of Appeals,
Fifth Circuit.
Dec. 16, 1974.

Before MOORE*, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

[1] The principal question in this case is whether there is a 180-day limitation on the power of the Equal Employment Opportunity Commission to bring actions under Title VII, Subchapter VI, of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1974). We hold that the statute contains no limitation, and accordingly reverse the district court.

I. Background of the Litigation

On February 28, 1970, Ben Thomas, a black male, was discharged by defendant Louisville & Nashville Railroad Company (L & N) for falsely answering an employment application question concerning his involvement in claims or suits for damages. On April 27, 1970, Thomas filed a charge with EEOC alleging he was discharged because of his race.

On November 4, 1970, EEOC's District Director found that the discharge was not racially motivated. On January 28, 1972, the Commission adopted the District Director's

*Hon. Leonard P. Moore, Senior Circuit Judge of the Second Circuit, sitting by designation.

finding that the Charging Party (Thomas) was not discharged because of race. It also found, however, that L & N had a practice of considering arrest records and using certain pre-employment tests in its hiring decisions, which provided reasonable cause to believe L & N was engaging in unlawful employment practices.

In accordance with the relevant statutory provisions, 42 U.S.C. § 2000e-5(b) (1974), L & N and EEOC began conciliation efforts, meeting initially on March 9, 1972. On May 31, 1972, the Commission notified L & N that it had sent a notice of right-to-sue to the Charging Party (Thomas) — because conciliation had not led to voluntary compliance with Title VII by L & N. *See* 42 U.S.C. § 2000e-5(f) (1) (1974), 29 C.F.R. § 1601.25 (1972). On July 16, 1973, the Commission brought this action in the district court, which held that Section 706(f) (1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f) (1) (1974), empowering the Commission to sue, contains a 180-day limitation on EEOC's right of action, barring the present claim. Alternatively the court held that the Commission had failed to comply with its own regulations concerning notice of termination of conciliation efforts.

II. Whether the Statute Limits EEOC's Right of Action

A. The Words of the Statute in the Context of Title VII

Section 706(f) (1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1), as amended, provides in relevant part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

> . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person agrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

This text, taken in its ordinary meaning, creates two rights. First, the Commission is empowered to bring civil actions if conciliation has failed, provided that thirty days have elapsed since the filing of the charge. Second, the Charging Party may bring his own action if the Commission has dismissed his charge or has taken no action within one hundred and eighty days. No explicit time limitation on the Commission's right to bring civil actions is mentioned in the subsection.

Other provisions of the Act do contain explicit limitations. For example, the private right of action authorized by Section 706(f)(1) contains a definite 90-day limitation on such suits. The private suit limitation makes the absence of any specific limit for Commission actions all the more conspicuous, and the difference must be taken to be intentional. The limitations provided elsewhere in Title VII are similarly specific and direct. In Section 706(e) the statute provides "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ." Section 706(c) states that

> . . . no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under

> the State or local law, unless such proceedings have been earlier terminated . . . .

See also Section 706(g), 42 U.S.C. § 2000e-5(g) (1974), relating to back pay ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

The enactment containing the 1972 amendments provided that the Commission's newly-created right of action extended to all charges then pending. Section 14, P.L. 92-261, 86 Stat. 113 (1972) (over 40,000 cases—*see* S.Rep. No. 92-415, 92d Cong., 1st Sess. 5, 6, 87 (1971) U.S. Code & Admin. News, 1972, p. 2137). It was apparent that the Commission would be precluded from acting on most of the crush of pre-1972 cases if a 180-day limitation applied. Even if the alleged 180-day limitation were construed to run from the date of the amendment applying the Commission's new right to bring suit in pending cases (March 24, 1972), most of these cases could not have been brought in time because of the enormous backlog. *See* EEOC v. Christiansburg Garment Co., Inc., W.D.Va., 1974, 376 F.Supp. 1067, 1070. "There is a presumption against a construction which would render a statute ineffective or inefficient . . ." United States v. Powers, 307 U.S. 214, 217, 59 S.Ct. 805, 807, 83 L.Ed. 1245 (1939). We are reluctant to nullify the provision extending the Commission's right to sue in pending cases, especially when the plain language of the statute points in the other direction.

L & N argues that the statute establishes one right of action held first by the Commission for one hundred and eighty days and then by private parties for ninety days, rather than two parallel rights. In support of its position L & N points to special rules of construction for statutes creating new causes of action, to EEOC's own regulations, and to the limitation on the Commission's right to intervene in private actions. None of these considerations, however, contradicts the interpretation we have set forth above.

[2, 3] If a statute creating a new cause of action contains a time limit, that limit is a restriction on the right itself. Such restrictions usually are construed more strictly than ordinary statutes of limitation. United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 162, 34 S.Ct. 550, 552, 58 L.Ed. 893 (1914); Simon v. United States, 5 Cir., 1957, 244 F.2d 703, 704; Northern Metal Co. v. United States, 3 Cir., 1965, 350 F.2d 833, 837.

[4] L & N contends Section 706(f) (1) does create a new cause of action, and therefore a stricter interpretation should be placed on the statute, leading to the conclusion that the running of 180 days terminates EEOC's cause of action. The flaw in this argument is that the strict rules invoked by L & N do not come into play until the court finds a limitation in the statute. These rules prohibit a relaxation of an express limitation, but they "are not helpful in determining whether a limitation should be implied." EEOC v. DuPont de Nemours, D.Del., 1974, 373 F.Supp. 1321, 1327 n. 4. Clearly Congress can create a right without fixing a time limitation, *see* Anderson v. United States Atomic Energy Com'n., 7 Cir., 1963, 313 F.2d 313, 316, and we believe it did so in Section 706(f) (1).

The Commission's regulations are even less convincing as evidence of a limitation in the statute. They provided that issuance of a notice of right-to-sue to a Charging Party "suspend[s] further Commission proceedings unless the Field Director determines it is in the public interest to continue such proceedings . . . ." 29 C.F.R. 1601.25a(d) (1972). In contrast, 29 C.F.R. 1601.25b(e) (1972) provided that notice to members of an aggrieved class of persons affected by conduct that is the basis of a *Commission-initiated* charge does not terminate the Commission's jurisdiction. From this distinction L & N infers that the Commission's own regulations acknowledge the expiration of its authority over a case upon notice of right-to-sue to a Charging Party. The fact that the Field Director has discretion to process the case beyond the 180-day period, however, belies the

assertion, repeatedly advanced by L & N, that the alleged limitation on EEOC's right of action is "jurisdictional." Moreover, § 1601.25a(d) has now been amended to conform to § 1601.25b(e), thus eliminating the distinction on which L & N's argument is based. *See* 29 C.F.R. § 1601.25b(e) (1973).

[5] L & N also suggests that the provision limiting EEOC's right of intervention in private actions indicates limits on its right to sue. Section 706(f)(1) provides that "the court may, in its discretion, permit the Commission . . . to intervene in such civil action [by a private party] upon certification that the case is of general public importance." The existence of this right does not indicate that the Commission's right to sue terminates at the beginning of the period during which the Charging Party may sue. The Commission's right to bring actions after one hundred and eighty days does not render its right of intervention superfluous. Large groups of employees whom the EEOC is charged with protecting would be bound by judgments entered in class actions brought by private parties. The Commission's right to sue could not prevent this injury, but its right to intervene does.

[6] EEOC's right of intervention is narrower than permissive intervention under the Federal Rules, *see* Fed.R.Civ. P. 24(b), but this restriction is not designed to limit the time within which the Commission may sue. Rather,

> "Congress had a paramount concern that the aggrieved employee secure prompt relief and may have been sensitive to the possibility that intervention by the Commission could broaden an individual suit and thereby delay relief for the aggrieved individual. It may be for this reason that Congress decided to give the court discretion as to intervention and prohibit Commission involvement except in those cases of 'general public importance' . . . ."

EEOC v. DuPont de Nemours, *supra*, 373 F.Supp. at 1331 n. 15.

B. The Legislative History

The plain words of the statute, especially when construed in light of the entire statutory scheme, strongly support the conclusion that there is no time limit on the Commission's right of action. This conclusion is reinforced by the legislative history.[1]

At one stage in the passage of the 1972 amendments to Title VII, Congress seriously considered a bill granting cease and desist powers to EEOC. That proposal contained an explicit 180-day limitation on the Commission's enforcement powers. Senate Bill No. 2515, 92d Cong., 1st Sess. 48 (Oct. 28, 1971). The omission of the limitation from the final version weakens L & N's contention that a 180-day time limit on EEOC's right to sue is to be implied from the 180-day ban on private actions.

The differences between the final version of the 1972 amendments and the pre-1972 statute also negate the suggestion that a limitation should be implied. Before the 1972 amendments, EEOC had no enforcement power but the Charging Party could bring an action after thirty days of

[1]A substantial majority of the courts that have considered the limitations issue have concluded that the statute contains no time limit. EEOC v. Cleveland Mills, 4 Cir., No. 73-2298, 502 F.2d 153 (1974); EEOC v. Western Electric Co., 382 F.Supp. 787 (1974); EEOC v. Rollins, Inc., Civ. No. 74-123 (N.D.Ga., June 7, 1974); EEOC v. Christiansburg Garment Co., W.D.Va., 1974, 376 F.Supp. 1067; EEOC v. DuPont De Nemours & Co., D.Del., 1974, 373 F.Supp. 1321; EEOC v. Huttig Sash and Door Co., 371 F.Supp. 848 (S.D.Ala., 1974); EEOC v. U. S. Industries, Civ. No. 73-283 (W.D.Tenn., Jan. 2, 1974); EEOC v. Eagle Iron Works, 367 F.Supp. 817 (S.D.Iowa, 1973); EEOC v. Duff Bros., Inc., 364 F.Supp. 405 (E.D.Tenn., 1973); EEOC v. Mobil Oil Corp., 362 F.Supp. 786 (W.D.Mo., 1973); EEOC v. Bartenders Int'l Union, Local 41, 369 F.Supp. 827 (N.D.Cal., 1973); EEOC v. Hickey-Mitchell Co., 372 F.Supp. 1117 (1973). *See contra*, EEOC v. General Dynamics Corp., Civ. No. CA-4-74-54, 382 F.Supp. 59 (N.D.Tex., 1974); EEOC v. Kimberly-Clark Corp., 380 F.Supp. 1106 (W.D.Tenn., 1974); EEOC v. Birmingham Stove & Range Co., Civ. No. 73-M-201 (N.D.Ala., Feb. 27, 1974); EEOC v. Griffin Wheel Co., Civ. No. 73-H-429-S (N.D.Ala., Feb. 5, 1974); EEOC v. Union Oil of Cal., 369 F.Supp. 579 (N.D.Ala., 1974).

conciliation efforts by the Commission. *See* Section 706(e), Civil Rights Act of 1964. The 1972 amendment barring private actions for 180 days is designed to give the Commission a more realistic period to pursue conciliation. It "serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement." EEOC v. Cleveland Mills, 4 Cir., 502 F.2d 153 (mimeo). It has no bearing on actions brought by the Commission.

The commentary accompanying the bill at various stages in its progress through the Congress shows no conclusive indication that a limitation was intended and contains much evidence to the contrary. It is apparent that the 1972 amendments were designed to make the Commission the major enforcer of the equal employment provisions of Title VII:

> [Section 706(f)(1)] allow[s] the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution. It is hoped that recourse to the private lawsuit will be the exception and not the rule . . . However, . . . it is necessary that all avenues be left open for quick and effective relief.

118 Cong.Rec.S. 3462 (March 6, 1972).

The Fourth Circuit interpreted this passage recently in the Cleveland Mills case, 4 Cir., No. 73-2298 (1974) 502 F.2d 153:

> [The commentary] indicate[s] that individual standing to sue is designed to let the individual choose between pursuing his own remedy and relying on the representation of the Commission. Clearly, that choice would be illusory if the Commission's right of action had already been extinguished.

Cleveland Mills, *supra*, 502 F.2d at 157. We concur in this reading.

Other inferences from the legislative history are possible. The floor debates in Congress contain suggestions of limitation, but these passages are highly ambiguous at best. Senator Dominick, one of the leading proponents of court enforcement instead of cease and desist powers, stated during the debate on the 1972 amendments:

> The amendment contains several cosmetic differences from the original amendment as well as one substantial change which reduces the time period within which the Commission may file a civil action against the respondent from 180 to 150 days from the time the Commission first issues its formal charge. 118 Cong.Rec.S. 1307 (Feb. 7, 1972).

At another point in the debate, however, the Senator notes "We can shorten the 180-day *private filing restrictions* as far as I am concerned, but . . . I do not think the Commission should be mandated on what date an agency should bring suit when we are trying to work out matters the best we can by conciliation." (Emphasis added). 118 Cong.Rec.S. 470 (Jan. 25, 1972).[2]

C. The Purposes of the Act and the 1972 Amendments

An implied 180-day limitation on the Commission's right of action would also be at odds with the purposes of Title VII and the 1972 amendments. Congress recognized that full compliance with Title VII could not be achieved by the Commission working with conciliation powers alone. 1972

[2]Senator Javits, a leading proponent of the cease and desist format, also indicated that he believed the final version was to contain a limitation:

> Let us understand that we are dealing with a round period of approximately 150 days, that that is the allowable time for the Commission to move into a given situation.

118 Cong.Rec.S. 1800 (Feb. 15, 1972). A few days earlier, however, Senator Javits stated "I feel the Commission should not, in view of its purpose, be under the kind of strict timetable . . . that the amendment sets out that it would otherwise be if we left the word 'shall' which is mandatory." (Referring to the passage "the Commission *may* bring a civil action" in Section 706(f)(1)). 118 Cong.Rec.S. 470 (Jan. 25, 1972).

Code Cong. & Admin. News at 2139-2140. The 1972 amendments were intended to strengthen Title VII rights. To imply a highly restrictive limitation would be to take back with one hand what Congress tried to give with the other.[3]

[7] Congress clearly was aware of the enormous backlog facing the Commission, *see* H.R.Rep. No. 92-238, 92d Cong., 1st Sess. 3-5, 12 (1971); S.Rep. No. 92-415, 92d Cong., 1st Sess. 5-6, (1971); 1972 U.S.Code Cong. & Admin. News 2137, 2139-2143, and of the additional burdens about to be created by expansion of the Commission's jurisdiction. *See* 118 Cong.Rec.S. 697 (Jan. 21, 1972). We cannot infer, without very convincing evidence, that Congress intended to curtail so severely the duration of EEOC's authority in the face of these demands on its limited enforcement resources. "A statute susceptible of more than one meaning," as Section 706(f)(1) arguably is, "must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." Shultz v. Louisiana Trailer Sales, Inc., 5 Cir., 1970, 428 F.2d 61, 65. *See generally* Securities & Exchange Com'n. v. Joiner, 320 U.S. 344, 350, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943); Haggar Co. v. Helvering, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940); Hattaway v. United States, 5 Cir., 1962, 304 F.2d 5, 9. This principle deserves special consideration when the statute in question is a broadly remedial one. *See* Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967).

In addition to foreclosing effective relief for a large number of complainants, the 180-day limitation would hamper conciliation by forcing the Commission to file suit lest its right be cut off. It is doubtful that Congress would have required EEOC to certify that conciliation had failed before suing but would have seriously compromised the Commission's ability to conciliate by limiting it to 180 days.[4]

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[3]We note that the 180-day limitation pressed by L & N would be far shorter than the limitations provided in many remedial statutes. *See, e.g.*, the Clayton Act, 15 U.S.C. §§ 12-27 (4-year period).

[4]L & N points to the provision for a sixty-day stay by the District Court after EEOC has filed, and contends that this feature of the

L & N does not dispute that Congress was concerned with EEOC's backlog, but argues that the 1972 amendments were designed to "force expedition in the place of slothful neglect" by placing time limits on the Commission's authority. Although the legislative history is dotted with reference to the Commission's backlog, *see, e. g.*, 1972 U.S.Code Cong. & Admin. News 2147, we find no significant indication that Congress attributed the backlog to inefficiency.[5]

III. L & N's Other Contentions

[8-10] Defendant offers three other grounds for affirming the judgment below. The trial court held in the alternative that the Commission did not give proper notice of failure to conciliate, in violation of its own regulation, 29 C.F.R. § 1601.23 (1972). L & N also contends that the Commission did not execute all the steps that are conditions precedent (charge, notice, investigation, finding of reasonable cause, attempted conciliation) to filing suit, and that the Commission did not seek conciliation in good faith. The Commission's notice of failure to conciliate, which included a copy of the right-to-sue letter it issued to the Charging Party, was completely adequate and in conformity with its regulations. 29 C.F.R. § 1601.25 (1972). As for the conditions precedent, it is clear that the Commission executed each step before filing suit. Defendant's objection is actually to the difference between the initial charge of racial discrimination filed by

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enforcement scheme would permit conciliation to continue. In many cases, however, even two additional months of conciliation would be insufficient. L & N notes that the National Labor Relations Board needs, on the average, 7.5 months to process a charge. This comparison is not helpful, however, since EEOC is a new agency with considerable backlog and problems that substantially differ from those of the NLRB. Moreover, to imply a 180-day limitation at the very least would make it necessary for the Commission's negotiators to acquaint a new set of personnel—those managing the litigation—with the details of the case. This transition would delay and upset the conciliation process even further.

[5] *Cf.* House Labor Committee Report, June 2, 1971, in "The Equal Employment Opportunity Act of 1972," Bureau of National Affairs, Wash., D.C. (1973), at 248.

Thomas and the Commission's findings concerning use of arrest records and pre-employment tests. We find that objection to be without merit. *See* Sanchez v. Standard Brands, Inc., 5 Cir., 1970, 431 F.2d 455, 466. Finally, the charge of bad faith is simply not supported by the record.

Our ruling at this phase of the case does not intimate any view on the merits. On remand the district court should consider whether there are equitable defenses available to defendants undre the peculiar facts and circumstances that will be developed on the merits of the case.

Reversed and remanded.

MOORE, Circuit Judge (dissenting):

I dissent.

The main question in this case is whether section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-5(f)(1)] imposes a 180-day durational limit on the right of the Equal Employment Opportunity Commission to institute judicial proceedings for the redress of allegedly unlawful employment discrimination. The issue has caused a split in judicial opinion which is perhaps sharper than usual, indicating that the often elusive Congressional intent is in this case particularly obscure. In terms of sheer numbers, the weight of judicial authority holds that section 706(f)(1) sets no time limitation on the right of the Commission to sue.[1] Fortunately, however, it is the persuasiveness of judicial reasoning and not the force of numbers which is of prime importance in our system. And although the question is admittedly not entirely clear, I am personally convinced that those courts holding that section 706(f)(1) does indeed impose a 180-day limit have properly interpreted the statute.

As the majority acknowledges, it is possible to cite portions of the legislative history which support either position.[2]

[1] See cases cited in footnote 1 of the majority opinion.

[2] See EEOC v. Union Oil Co. of California, 369 F.Supp. 579, 580-584 (N.D.Ala. 1974), where the court summarized the arguments, pro and con, regarding the 180-day limit and cited pertinent portions of the legislative history.

Thus, I do not feel that this referent is particularly helpful in this instance. Rather, the language of section 706(f) (1) must be read and interpreted with a view toward the broad Congressional purposes underlying Title VII—that prompt, efficient methods be enacted and utilized to eradicate racial and sex discrimination in employment. *See, e. g.*, EEOC v. General Dynamics Corp., No. CA 4-74-54, 382 F.Supp. 59 (N.D.Tex., 1974). In my view, affording the Commission a right to sue which is without a definite limit is anathema to that goal.

The United States Court of Appeals for the Eighth Circuit recently summarized the procedure established by the 1972 amendments to Title VII and particularly by section 706 (f) (1).

1. A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
2. If the Commission finds reasonable cause to believe that the charge is true, and conciliation attempts prove unsuccessful, the Commission may bring suit against the respondent within 180 days of the filing of the charge. The charging party shall have the right to intervene in the Commission's suit.
3. If the Commission fails to file an action within 180 days, it shall notify the charging party.
4. Within 90 days after receipt of notice, the charging party may bring a civil action against the respondent. Should a private action be brought, the Commission may intervene, in the discretion of the court, upon certification that the case is of general public importance.

EEOC v. Missouri Pacific R. R., 493 F.2d 71, 74 (8th Cir. 1974). On its face this is an orderly procedure which for 30 days gives the Commission an opportunity to investigate and seek conciliation, for 150 additional days affords the Commission the right to sue while at the same time seeking an accommodation with the employer, and finally, after 180

days, grants the aggrieved individual a right of action for 90 days. Yet the Commission asserts that its authority to sue continues beyond the 180-day mark when the private right of action accrues. Reading the statute otherwise would, according to the Commission, unduly hamper the performance of its task, since 180 days is insufficient time to negotiate with the alleged violator. Moreover, the necessity of filing a suit to meet the 180-day deadline would assertedly interfere with conciliation efforts.

There is no doubt that Congress was well aware of both the average time necessary to process complaints and of the backlog which was confronting the Commission at the time of the 1972 amendments.[3] But to conclude that Congress could therefore not have intended to impose a time limit on the Commission seems to me erroneous.[4] A stronger inference is that Congress intended to expedite the administrative process and to eliminate the interminable delays which had previously been the rule. The entire thrust of section 706 (f) (1) is toward increased efficiency. Starting with the filing of the charge, Congress set up a timetable—30 days for pure conciliation, 180 days for further negotiations before a right to sue letter issues to the private individual, 90 days in which the aggrieved party can bring suit. Congress clearly contemplated that the conciliation process would begin almost immediately and that serious efforts would be made before the individual was given the right to sue privately. To hold that the Commission has an open-ended period in which it may

[3]See House Report No. 92-238, 92d Cong. 1st Sess. 3-5, 12 (1971), Senate Report No. 92-415, 92d Con. 1st Sess. 5-6, 87 (1971); 1972 U.S. Code Cong. & Admin. News 2137, 2139-2143.

[4]Apparently no court has yet dealt with the problem of whether suits based on charges already pending before the Commission for over 180 days at the time of the 1972 amendments are foreclosed. This case does not present the issue, since the charge here was filed after the amendments. In view of the fact that the amendments were made applicable to already pending cases, however, it would not be an unreasonable position that in these cases the 180-day period began running from the date of the amendments and not the date of filing of the charges.

bring an action seems calculated to encourage delays and to undermine conciliation efforts. It is well-known that an imminent deadline, and in particular the pendency of a lawsuit, is apt to make even the most hard-line bargainers soften their position. Thus, a 180-day limit on the Commission's right to sue seems likely to promote settlements. And merely because the 180th day comes and a suit is filed does not mean that talks must terminate. Nothing prohibits the settlement of a pending lawsuit, and in fact section 706(f)(1) explicitly refers to the possibility of settlement by giving the district court discretion to stay proceedings for 60 days while the Commission makes further efforts to achieve voluntary compliance.

Further supporting a reading of the statute which imposes a 180-day limit on the Commission is avoidance of duplicative lawsuits. If the Commission's right to bring judicial proceedings is not cut off when the right of the individual starts, there is a significant chance that two lawsuits will be pending which deal with substantially identical issues.[5] Various courts have dealt with this problem[6] and solutions other than reading the statute as imposing 180-day limit are available. It would be possible to hold, for example, that the Commission's right to sue terminates only when an individual actually starts proceedings. The Commission itself has suggested that it may not bring an action during the 90-day period in which the aggrieved individual has the right to sue, but that its right revives upon the expiration of the 90-day period

[5]It is clear that when Congress was considering the alternative course of giving the EEOC power to issue cease and desist orders, avoidance of duplicative proceedings was of major concern. *E. g.*, House Report No. 92-238, 92d Cong. 1st Sess. (1971), U.S. Code Cong. & Admin. News 1972, p. 2137. Although the same concern does not appear expressly after the cease and desist proposal was dropped in favor of allowing the Commission to seek pretrial enforcement, there is no reason why the problem of duplicative proceedings is just as significant when they are both judicial in nature.

[6]See EEOC v. Missouri Pac. R. R., 493 F.2d 71 (8th Cir. 1974); EEOC v. Huttig Sash & Door Co., 371 F.Supp. 848 (S.D.Ala. 1974); EEOC v. Cronin, 370 F.Supp. 579 (E.D.Mo. 1973); EEOC v. Union Oil Co. of California, 369 F.Supp. 579 (N.D.Ala. 1974).

if the individual has taken no action.[7] Either of these alternatives tortures the language of the statute when a simple straightforward reading obviates the necessity of making such semantic contortions.

I do not dispute that the 1972 amendments made the Commission the prime enforcer of Title VII rights, but a 180-day limit seems in no way inconsistent with that goal. The Commission is given first crack at enforcement for a period of six months. And even when the right of action accrues to the individual, the Commission retains a limited right of intervention when a case is of public importance. This role is undeniably substantial, and I am not convinced that Congress intended to enlarge it by granting an unlimited right to sue, for this right will, I believe, tend to undercut the effectiveness of the Commission as the first line of enforcement.

Accordingly, I would affirm the dismissal of the suit.

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[7]EEOC v. Cleveland Mills Co., 364 F.Supp. 1235, 1238 (W.D. N.C. 1973), rev'd., No. 73-2298, 502 F.2d 153 (4th Cir. 1974).

APPENDIX II

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

No. CA 73-H-665-S.

United States District Court,
N. D. Alabama,
S. D.
Jan. 8, 1974.

MEMORANDUM OPINION

HANCOCK, District Judge

This cause was heard at the regularly scheduled motion docket on January 4, 1974, on the motion of defendant Louisville and Nashville Railroad Company to dismiss the complaint or in the alternative for summary judgment. Since resolution of the issues raised by this motion requires reference to affidavits and exhibits extrinsic to the complaint, the motion will be disposed of as one for summary judgment. In ruling on this motion the Court is relying on (1) the complaint, (2) the affidavits and exhibits attached to defendant's motion to dismiss and defendant's report on conciliation, (3) the affidavits and exhibits attached to the Commission's memorandum in opposition to defendant's motion to dismiss, and (4) argument of counsel.

The undisputed facts are as follows: On April 27, 1970, a charge was filed by the charging party against respondent L & N charging that respondent had discharged the charging party because of race. Notice of the charge was served on respondent; and the Commission's investigation was culminated on November 24, 1970, when the Commission's District Director entered findings of fact that indicated that race was not a factor in the discharge of the charging party.

Nothing further occurred between the Commission and respondent until thirteen months later when respondent received the Commission's decision dated December 30, 1971, finding that respondent had discriminated with regard to race in two specific hiring practices. Conciliation efforts were initiated by the Commission on March 9, 1972; and the Commission and respondent entered into conciliation discussions thereafter until May 31, 1972, at which time respondent received a letter from the Commission informing respondent that conciliation efforts had failed and that a notice of right-to-sue letter had been issued to the charging party. No suit has been filed by the charging party, but on July 16, 1973, the Commission filed the present action.

On the motion of the defendant, this Court on September 10, 1973, entered an order staying proceedings herein for 60 days pending further efforts of the Commission to obtain voluntary compliance as provided in the 1972 Amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1). Subsequent to the entry of this order the Commission's Regional Litigation Center determined that it could not refer the case to the District Office for further efforts at conciliation. Rather, the Litigation Center determined that it must maintain control over the case, and that therefore the protections afforded to conciliation efforts by 42 U.S.C. § 2000e-5(b) (Supp.1972), would not be applied to any further discussions held in attempting to obtain voluntary compliance. Upon expiration of the 60 day stay, defendant filed the motion under consideration asserting, inter alia, (1) that this Court lacks jurisdiction to entertain this suit by the Commission because of the failure of the Commission to file this suit within 180 days after the filing of the charge, and (2) that this action should be dismissed because of the failure of the Commission to follow its own regulations and give defendant notice that the Commission deemed conciliation efforts to be ended unless reinstated by defendant.

The first question raised by defendant's motion is as follows: What rights, if any, does the Commission have to file

suit after the 180th day from the date the charge is filed?[1]

The answer to this question must be found in Section 706 of the Act, as amended, 42 U.S.C. § 2000e-5 (Supp. 1972) since the Commission has no authority to file suit except as may be created therein. The basic statutory scheme contemplated by such Section 706 (excluding those cases where the charge is referred to a state agency and those cases where the Attorney General brings suit) is as follows: The aggrieved person or a member of the Commission has 180 days from the date that the alleged unlawful employment practice occurred to file a charge. Notice of the charge is to be served upon the respondent named therein within 10 days, and for 30 days after the filing of the charge no party may file suit. If the Commission has not been able to secure a conciliation agreement acceptable to the Commission within 30 days, the Commission may file a civil action in which the aggrieved party may join. Should the Commission fail to file suit within 180 days after the charge has been filed, the Commission must give the aggrieved party notice of his right to sue within 90 days after the giving of such notice. Upon certification that the case is one of general public importance, the Commission may be allowed, in the discretion of the Court, to intervene in the aggrieved party's suit.

[1-3] It is the opinion of this Court that the time period from the 30th day after a charge is filed until the 180th day after the charge is filed is the sole time within which the Commission may file suit on its own behalf (except in instances where the charge is referred to a state agency or where the Attorney General brings suit, neither of which are present in the instant action). Further, since an aggrieved party must bring suit within the statutory time limits, Genovese v. Shell Oil Co., 488 F.2d 84 (5th Cir., 1973), the act does not authorize *any* suit to be filed after the 270th

[1]Since the instant action was filed approximately 16 months after the effective date of the 1972 Amendment to Title VII, it is not necessary for the Court to decide whether suits could be filed within 180 days after such effective date with regard to all charges filed on or before the effective date.

day from the date the charge was filed. Therefore, from the undisputed fact that this action was not filed by the Commission until over three years after the charge upon which the action is based was filed, it is the conclusion of this Court that this Court lacks jurisdiction and that this action must be dismissed.

The above result was reached by the district court in EEOC v. Cleveland Mills Co., 364 F.Supp. 1235 (W.D.N.C. 1973). For the reasons expressed in that opinion, together with those expressed herein, the Court feels compelled to reach the above result, notwithstanding the fact that there is some authority to the contrary. EEOC v. Bartenders International Union, Local 41, 369 F.Supp. 827 (N.D.Cal. 1973); EEOC v. Mobil Oil, 362 F.Supp. 786 (W.D.Mo. 1973).

As the Court stated in *Cleveland Mills*, "This statute leaves much to be desired in clarity and precision." 364 F. Supp. at 1237. Compounding the problem is the fact that the legislative history relating to the 1972 Amendment to the Act provides little guidance to the Court on the matter under consideration. It appears from the report of the House Committee on Education and Labor that the statutory scheme was developed with the intent of structuring the Commission as a quasi-judicial administrative agency, much like the National Labor Relations Board, with the power to enforce Title VII through the issuance of complaints heard by an internal administrative tribunal and followed by the issuance of cease and desist orders. *See* House Report No. 92-238, vol. 2, U.S. Code, Congressional and Admin. News, pp. 2137-2179 (92nd Congress 2nd Session 1972). However, the report of the House Senate Conferees on the final version of the bill shows that the plan to give the Commission enforcement powers through the medium of civil actions in the federal district courts was substituted by amendment. *Supra* at pp. 2179-2186.

[4] Where a statute creates a new right but also contains limitations on the right created, the limitations become a part of the right created and must be complied with strictly.

United States v. McCord, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914). As the court in *Cleveland Mills* quoted from the Fifth Circuit in Simon v. United States, 244 F.2d 703, 705:

> "A statute which in itself creates a new liability, [giving] an action to enforce it unknown to the common law, and [fixing] the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."

It follows that any conditions that Congress may have attached to the right of the Commission to bring a civil action must be complied with before the Commission can maintain such an action.

The Commission contends that Congress placed no time limitations on its right to bring suit to enforce Title VII, and in support of this position the Commission refers to the legislative history which shows clearly that in considering the 1972 Amendment Congress was concerned with the backlog of charges before the Commission. One of the reasons for this Congressional concern was the damage done to the rights of aggrieved persons as a result of administrative delay. From the statute it would appear that Congress intended to remedy the injustice caused by this delay by forcing the Commission to allow the aggrieved party to file an individual suit if the Commission had not acted within the 180 day limit. It does not follow that because Congress was aware of the delay that attended Commission proceedings prior to the 1972 Amendment that Congress must be taken to have placed no time limitations on the right of the Commission to file suit.

[5] Support for the opinion that Congress placed a 180 day limit on the right of the Commission to file suit can be found from the scheme of Section 706(f)(1). The very

fact that the 1972 Amendment gave the Commission a conditional right to intervene in a privvate suit brought after the 180 day period shows a Congressional intent to foreclose the Commission from filing suit on its own behalf after the 180 day period. If Congress had not intended for the 180 day period to limit the Commission's right to file suit, Congress need not have made express provision for the right of the Commission to intervene in a private suit. Congress did so provide, however, and this provision must be given meaning. The entire statutory scheme appears to contemplate a procedure where the rights of aggrieved persons would be promptly vindicated by either voluntary compliance or the filing of a civil action within a maximum of 270 days. The Commission's contention that a respondent may be held in a state of suspended animation with the threat of a massive and expensive lawsuit for an indefinite period of time after both the Commission and the aggrieved party have had ample opportunity to sue but have failed to do so cannot be accepted.

[6] Without doubt the overriding concern of Congress in passing the 1972 Amendment to Title VII was to achieve prompt and full compliance with the mandate of the Civil Rights Act of 1964 in the area of employment practices. The instant decision does nothing to thwart that intent. Should the employment practices that were sought to be remedied by Title VII continue to exist, fresh charges doubtless will be filed; and the Commission can and must move swiftly to eliminate such practices within the time limitations placed by Congress in the 1972 Amendment. Further, this decision does no harm to the rights of individual aggrieved persons since in every case they have had or will have an opportunity to file suit on their own behalf. But to allow the Commission to extend these time limits indefinitely would prejudice not only respondents, who are placed in a position of never knowing when and if the Commission might choose to bring suit on charges that are growing ever more stale, but also the rights of as yet unknown aggrieved persons

who may be dissuaded from filing fresh charges by the fact that no resolution has been made of a prior charge.

The second ground of defendant's motion for summary judgment relies upon the alleged failure of the Commission to give the defendant notice of the failure of conciliation efforts as required by the Commission's own regulations.

[7] From the language of the Act it is clear that the Commission has a duty to attempt to achieve voluntary compliance from a respondent through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (Supp. 1972). The Commission has promulgated internal regulations designed to insure that effective efforts at conciliation are made prior to its instituting a civil action. 29 C.F.R. § 1601.23 provides:

> "Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the *respondent shall be notified promptly, in writing, that such efforts have been unsuccessful* and will not be resumed except upon the respondent's written request within the time specified in such notice." (Emphasis supplied.)

There is no dispute as to the material fact that the Commission did not send defendant the notice required by this regulation. However, it is also undisputed that the Commission did send defendant notice that the aggrieved party had requested and had been issued a right-to-sue letter. This notice also contained a reference to the fact that the Commission had deemed that efforts at achieving voluntary compliance through concilation had failed.

[8] Where a regulation promulgated by an administrative agency is designed to create important procedural rights, the agency must follow that regulation closely. Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959). It has been held that the failure of the Commission to give

a respondent the notice required by § 1601.23 must result in the dismissal of a subsequent civil action brought by the Commission. EEOC v. Firestone Tire and Rubber Company, 366 F.Supp. 273 (D.C.Md. 1973). As noted by the court in the *Firestone* case, § 1601.23 confers upon a respondent an important procedural right. This right is the right to be notified that the conciliation stage of a Commission proceeding is about to end unless the respondent acts promuptly. Thus this notice allows a respondent one last chance to alter its position with regard to the issues being discussed during conciliation with the knowledge that the statutory scheme provides for litigation as the next step.

[9] The Commission contends that § 1601.23 applies only to the respondent who either completely ignores conciliation efforts by the Commission or enters into those discussions in bad faith. Certainly logic as well as notions of fair play would dictate that the respondent who enters into conciliation efforts in good faith is as entitled to the procedural benefits of § 1601.23 as is the recalcitrant respondent.

[10, 11] The Commission next contends that notice of issuance of a right-to-sue letter can substitute for the notice required by § 1601.23. It is the opinion of this court that such notice does not fulfill the requirements of § 1601.23 in that it does not inform the respondent that conciliation discussions may be reopened upon written request. It is doubtful that the failure of the Commission to give a respondent this § 1601.23 notice would prejudice the right of an aggrieved party to file suit since the failure of the Commission to attempt conciliation is not a jurisdictional bar to a suit by an individual. Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). But insofar as the Commission is concerned notice of issuance of a right-to-sue letter cannot be substituted for the notice required by the Commission's own regulation in § 1601.23. If the Commission wishes to file a civil action within the 180 day period in which it may do so, it must first conclude conciliation efforts in accord with its own regulations.

In summary, the court is of the opinion that this action was not brought within the time limitations expressed in 42 U.S.C. § 2000e-5(f) (1) (Supp. 1972) and that therefore this court has no jurisdiction over this action.

The court is also of the opinion that this action is likewise due to be dismissed for the failure of the Commission to comply with its own regulations in that defendant was never given the notice provided for in 29 C.F.R. § 1601.23. Accordingly, an order granting the motion for summary judgment and dismissing this action will be entered.

APPENDIX III

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office Of The Clerk

January 30, 1975

TO ALL COUNSEL OF RECORD

No. 74-1185—EEOC v. LOUISVILLE & NASHVILLE RAILROAD COMPANY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ ANNE G. PARENT
Deputy Clerk

APPENDIX IV

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v

HICKEY-MITCHELL COMPANY, Defendant-Appellee.

No. 74-1373.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 15, 1974.

Decided Dec. 11, 1974.

Before LAY and HEANEY, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

The Equal Employment Opportunity Commission (EEOC) appeals from an order of the district court[1] entered May 9, 1974 dismissing without prejudice its action against the Hickey-Mitchell Company (hereinafter the Employer) for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Supp. II, 1972), amending 42 U.S.C. § 2000e (1970).[2] After an evidentiary hearing the court found that

*Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1]The Hon. John F. NANGLE, United States District Judge, Eastern District of Missouri.

[2]A previous ruling of the court is found in EEOC v. Hickey-Mitchell Co., 372 F.Supp. 1117 (E.D.Mo. 1973). There the court refused to dismiss the complaint on the ground that it had not been filed within 180 days of the filing of the charge, holding that the Act did not so require. *Accord*, EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974). It did, however, dismiss Count II of the complaint (which alleged sex discrimination) as not within the proper scope of an investigation of the original charge (which alleged racial discrimination). The court also granted a protective order in favor of the Employer, delaying discovery until the court resolved "the jurisdictional issue of whether the plaintiff was unable to secure an acceptable conciliation agreement." 372 F.Supp. at 1123.

In view of our resolution of the issues herein, we need not reach and we express no opinion on the 180 day issue.

the Commission had failed to follow its own conciliation procedures and, consequently, had failed to prove satisfaction of the statutory condition to the maintenance of this action —that it had been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).[3] Specifically, the court found the Commission had not mailed the notice required by 29 C.F.R. § 1601.23 (1974), which provides:

> Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

Before us the Commission does not dispute that the regulation was not followed, but urges that in the circumstances

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[3] 42 U.S.C. § 2000e-5 (Supp. II, 1972) provides in pertinent part:

(a) * * *

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) * * *

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved * * * alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * on such employer * * * (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *

* * * * * * *

(f) * * *

(1) If within thirty days after a charge is filed with the Commission * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent * * * named in the charge * * *

of this case, 1) compliance with the regulation was not required, and, alternately 2) noncompliance was not prejudicial to the Employer. Such circumstances, as found by the trial court, we here summarize. On March 15, 1972 Margo Owens filed a charge with the Commission alleging that because of her race the Employer paid her less than a white employee doing the same work. The Commission's investigation of these charges in August, 1972 ultimately resulted in the Commission's determination on November 30, 1972 that reasonable cause existed to believe that the Employer had engaged in an unlawful employment practice. A copy of this determination, including a "Notice of Conciliation Process" and an invitation to join with the Commission "in a collective effort toward a just resolution of this matter," was mailed to the Employer December 6, 1972.[4] In January, 1973 the Employer's attorney, F. Douglas O'Leary, spoke by telephone with James Helm, a Commission official, concerning conciliation of the Owens charge. Mr. O'Leary indicated little willingness to conciliate the charge. At Mr. Helm's request, Mr. O'Leary wrote Mr. Helm a letter dated January 12, 1973 wherein Mr. O'Leary declined to engage in conciliation with the Commission.[5] No further contact occurred between the parties until this action was instituted May 9, 1973.

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[4]The Notice of Conciliation Process states in part:

[A] Commission representative will contact each party to ascertain their willingness to engage in settlement discussions and, if the parties are willing, join with them in a collective effort to arrive at a just settlement. Should the Respondent decline to enter into settlement discussions, or should the Commission representative for any reason be unable to secure a settlement acceptable to the District Director, he shall so inform the parties in writing and advise them at that time of the court enforcement alternatives available to the Charging Party and the Commission.

[5]The body of the letter reads:

This will confirm our telephone conversation. My client, Hickey-Mitchell Company, sees no purpose in attempting any conciliation for the reason that we feel our handling of this matter was entirely correct and the so-called finding of the District Director is without any basis whatever. Further, even if this were a matter that might be subject to conciliation, it appears to us that the attitude and

[1, 2] We are thus squarely confronted with the issue of whether the Commission's failure to give the notice required by 29 C.F.R. § 1601.23 (1974), that the Commission considers the conciliation efforts unsuccessful and intends to terminate them, should bar the prosecution of the Commission's civil action under 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972). We are not without guidance in this area; two district courts in addition to the court below have considered the issue and resolved it against the Commission. EEOC v. United States Pipe & Foundry Co., 375 F.Supp. 237, 246-248 (N.D.Ala. 1974); EEOC v. Louisville & Nashville R.R., 368 F.Supp. 633, 638-639 (N.D.Ala. 1974); EEOC v. Firestone Tire & Rubber Co., 366 F.Supp. 273 (D.Md. 1973). We may reject out of hand the Commission's contention that the regulation is not applicable to the situation before us. The argument that the limited purpose of the regulation is to "make certain that a respondent's failure to engage in conciliation is not the result of inadvertence or neglect" ignores the fact that the regulation applies in terms to a respondent's "fail[ure] *or refus*[*al*]" to conciliate.[6] That the Employer intentionally and knowingly declined to conciliate does not take the case out of the ambit of the regulation.

More serious, however, is the Commission's claim that the January 12 letter conclusively demonstrates its inability to secure a conciliation agreement within the meaning of 42

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methods of the local representatives of the Commission are such that no employer would receive fair treatment.

We would be delighted to have some procedural method available within the Commission to appeal this decision, but I understand there is no such procedure available. If the Commission or any other person wants to take further action, we would assume that such action will take place in a forum where there would be a fair and impartial hearing by persons who do not have a preconceived result in mind while considering the evidence.

[6] 29 C.F.R. § 1601.23 (1974) (emphasis added). We note that in another context the Commission has apparently argued that § 1601.23 "applies only to non-cooperative and recalcitrant respondents." EEOC v. United States Pipe & Foundry Co., 375 F.Supp. 237, 246 (N.D.Ala. 1974).

U.S.C. § 2000e-5(f) (1) (Supp. II, 1972),[7] and that the failure to give the § 1601.23 notice is at most a technical error which did not prejudice the Employer. Resolution of this issue requires a brief examination of the purpose of the regulation and the function of conciliation, generally, in the enforcement scheme of Title VII.

As originally enacted Title VII did not empower the Commission to sue employers to enforce the Act.[8] Rather, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving" equality of employment opportunities.[9] Voluntary compliance proved elusive, however, as more than half of the Commission's conciliation efforts were deemed unsuccessful.[10] Consequently, Congress enacted the Equal Employment Opportunity Act of 1972 which amended Title VII to permit Commission suits.[11] The statutory mandate that the Commission attempt conciliation was not abandoned, however,[12] and the Act expressly conditions the Commission's powers of suit on its inability to "secure

[7] 42 U.S.C. § 2000e-5(f) (1) (Supp. II, 1972) provides in part:

> If * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent * * * named in the charge.

[8] Act of July 2, 1964, Pub.L. 88-352, tit. VII, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1970).

[9] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974).

[10] S.Rep. No. 92-415, 92nd Cong., 1st Sess. 5 (1971); *see* H.Rep. No. 92-238, 92nd Cong., 1st Sess. 8-9 (1971).

[11] Act of March 24, 1972, Pub.L. No. 92-261, § 4, 86 Stat. 105, amending 42 U.S.C. § 2000e-5 (1970) (codified at 42 U.S.C. § 2000e-5(f) (1) (Supp. II, 1972)). *See generally* Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L.Rev. 824 (1972).

[12] 42 U.S.C. § 2000e-5(b) (Supp. II, 1972), amending 42 U.S.C. § 2000e-5(a) (1970) provides in part:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

from the respondent a conciliation agreement acceptable to the Commission."[13] As the House sponsor of the bill stated:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement.[14]

Indeed, it is essential, as one observer notes, that negotiation remain the primary mode of enforcement, lest the Commission's energies be dissipated in interminable litigation in the Federal courts, which, whatever the outcome, would be detrimental to efficient and effective implementation of Title VII.[15]

Although the lower federal courts have differed over whether the fact of failure of conciliation must be affirmatively pleaded by the Commission,[16] it is beyond dispute that a Commission lawsuit brought before any attempt at conciliation is premature. EEOC v. Westvaco Corp., 372 F.Supp. 985, 991-993 (D.Md. 1974); EEOC v. E. I. DuPont de Nemours & Co., 373 F.Supp. 1321, 1333-1334 (D.Del. 1974). "The Commission's power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII."[17]

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[13]42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

[14]118 Con.Rec. 7563 (1972) (remarks of Congressman Perkins.)

[15]Blumrosen, The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureauracy, 49 Notre Dame L. 46, 47-48 (1973). Blumrosen notes a disturbing change in the Commission since the 1972 amendment; it has hired hundreds of lawyers while leaving vacant the post of Chief of the EEOC Office of Conciliation. *Id.* at 48, 58-59.

[16]*E. g.*, EEOC v. Eagle Iron Works, 367 F.Supp. 817, 822-823 (S.D.Iowa 1973); EEOC v. Mobil Oil Corp., 362 F.Supp. 786, 788-790 (W.D.Mo. 1973); EEOC v. Guaranty Sav. & Loan Ass'n., 369 F.Supp. 36 (N.D.Ala. 1973); EEOC v. W. Elec. Co., 364 F.Supp. 188 (D.Md. 1973).

[17]EEOC v. E. I. DuPont de Nemours & Co., 373 F.Supp. 1321, 1333 (D.Del. 1974).

Against this background we must review the Commission's breach of 29 C.F.R. § 1601.23 (1974) providing for notice to the respondent of the imminent termination of the conciliation process. We agree with the court below that the regulation affords even the most uncooperative and recalcitrant respondent[18] "the right to be told that it has one last chance to attempt conciliation."[19] In view of the central role of conciliation in the scheme of Title VII we cannot say the regulation is merely "technical." This is an area where animosities run high and negotiations may be difficult to initiate.[20] The regulation reflects formal recognition by the Commission of the need to keep the doors of communication open even where, as here, it has received a flat refusal to engage in conciliation discussions.

> We are, of course, aware of the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547 quoting this court in NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953).[21] However, the Commission offers no acceptable justification for its breach of the regulation in this case, and we cannot conclude that the Employer was

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[18]Note 6, *supra* and accompanying text.

[19]Memorandum Opinion at 7, quoting EEOC v. Firestone Tire & Rubber Co., 366 F.Supp. 273, 276 (D.Md. 1973); *see* EEOC v. United States Pipe & Foundry Co., 375 F.Supp. 237, 246 (N.D.Ala. 1974); EEOC v. Louisville & Nashville R.R., 368 F.Supp. 633, 638 (N.D.Ala. 1974).

[20]*Cf. Gardner*, The Development of the Substantive Principles of Title VII Law: The Defendant's View, 26 Ala.L.Rev. 1, 7 (1973).

[21]*See generally* Note, Violations by Agencies of Their Own Regulations, 87 Harv.L.Rev. 629 (1974).

not prejudiced by it. The Employer's letter refusing to conciliate is, as we have noted, the event which should have triggered the application of the regulation, not the excuse for ignoring it. Compliance with the regulation, a last gesture by the Commission of a conciliatory attitude, may well give pause to the most (theretofore) recalcitrant employer, now indubitably faced with expensive and time-consuming litigation, and thus lead to a resolution of these disputes in the congressionally preferred forum.

Affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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INTEREST OF THE AMICUS.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of com-

* Consent of Respondent and Petitioner's letter stating its non-objection to the Chamber's filing of the instant brief have been filed with the Court.

merce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views in areas which significantly affect their rights and interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases raising significant Title VII** and related questions. *E.g., Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971); *Geduldig* v. *Aiello,* 417 U. S. 484 (1974); *DeFunis* v. *Odegaard,* ..... U. S. ....., 40 L. Ed. 164 (1974); *Emporium Capwell Co.* v. *Western Addition Community Organization,* ..... U. S. ....., 9 FEP Cases 195 (1975); *Albemarle Paper Co.* v. *Moody,* 74-389, argued April 14, 1975; *Liberty Mutual Insurance Company* v. *Wetzel,* No. 74-1245, petition for writ of *certiorari* granted.

The petition in this case raises significant questions involving the interpretation of Title VII and the severe dislocation which has resulted from the failure of the Equal Employment Opportunity Commission (EEOC or Commission) to properly administer and fulfill its responsibilities under that Act. Whether the EEOC may disregard and act contrary to the Congressional design and its own procedural regulations in the investigation, determination and conciliation of unfair employment practice charges because the Commission deems it "appropriate" to do so, and whether the EEOC's authority to bring suit is unrestricted by any statutory time limitation are questions which vitally affect the due process rights of not only the Chamber's members but every employer who is subject to the statutory reach of the Act. More important, these questions are representative of a basic problem—the EEOC's continual failure to adopt and adhere

** Title VII of the Civil Rights Act of 1964, as amended, 42 USC [Supp. II, 1972] § 2000e, *et seq.;* hereinafter referred to as "Title VII" or the "Act".

with predictability or regularity to administrative standards which conform to Congressional design. This failure has severely retarded the Commission's ability to implement the Congress' objective to the detriment not only of the due process rights of those charged with unfair employment practices, but the substantive rights of charging parties whom the Act is designed to protect as well.

Since, under the statutory scheme of Title VII, the EEOC is a mere investigator, conciliator and prosecutor, and not an administrative agency imbued with decision-making authority, the judiciary is charged with the responsibility of giving the Commission the proper guidance in its duties and responsibilities. Because of a division of view among the courts with respect to the issues presented here, there is an unsatisfied need on the part of all those charging parties who look to the Commission for relief as well as all those employers who seek to comply with the Act, to have a delineation of standards which govern the processing of unfair employment charges. Only this Court can satisfy that need.

ARGUMENT.

THE INSTANT CASE POSES SIGNIFICANT UNANSWERED QUESTIONS IN THE ADMINISTRATION OF TITLE VII WHICH SHOULD BE RESOLVED BY THIS COURT.

The petition in this case raises several questions involving the statutory interpretation of Title VII and the EEOC's failure, in the administration of the Act, to adhere to standards which comport with the Congressional design. Specifically, the Petitioner questions (1) whether §706(f)(1) of the Act imposes a limitation on the time within which the EEOC must administratively process and bring suit on an unfair employment practice charge;[1] (2) whether, in disregard of its own regulations designed to implement the Congressional policy making conciliation the paramount means of achieving Title VII compliance, the EEOC may ignore the conciliation process and institute suit;[2] and (3)

1. 42 USC [Supp. II, 1972] § 2000e-5(f)(1) provides in relevant part:

> "If within thirty days after a charge is filed . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . If . . . within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person . . . and within ninety days after . . . such notice a civil action may be brought against the respondent . . . by the person claiming to be aggrieved."

In the instant case, although the investigation of the charge was completed within seven (7) months, the Commission did not make a "reasonable cause" determination and seek to conciliate with the Company for another sixteen (16) months and did not bring the instant action until over three years after the charge had been initially filed. Petition at 5-6.

2. EEOC regulation § 1601.23, 29 C. F. R. § 1601.23 provides:

> "Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good

whether, in view of contrary interpretations rendered under statutes in *pari materia,* the EEOC may disregard conciliation standards equally applicable under the administration of Title VII and the Age Discrimination in Employment Act.[3]

There are compelling reasons why these questions concerning the administrative procedures employed by the EEOC in implementing its statutory responsibilities should be considered by the Court.

First, the EEOC has failed to implement administrative standards and procedures for the proper administration of Title VII. The Commission has acted contrary to Congressional will and in a manner inconsistent with notions of procedural fairness and regularity. Indeed, the specific questions concerning the agency's practices and the lack of standards complained of by the Petitioner herein are not unique. They arise with regularity and have engendered conflicts among the district and circuit courts.[4]

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faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the *respondent shall be notified promptly, in writing that such efforts have been unsuccessful* and will not be resumed except upon the respondent's written request *within the time specified in such notice."* (Emphasis supplied)

The notice required by § 1601.23 was never sent in this case. Rather, and even despite the fact that the L & N was cooperating with the EEOC conciliation officer in an effort to resolve the matter, in the midst of conciliation, the EEOC sent the charging party a "right to sue" letter advising him "that a satisfactory settlement had not been reached." App. 40, 68, 67.

3. Age Discrimination in Employment Act of 1967, 29 USC § 621, *et seq.;* hereinafter "ADEA."

4. Thus, whether the EEOC may disregard the notice requirement set forth in the Commission's regulations, § 1601.23, *supra,* has caused a divergence of view among the Fifth Circuit herein, the Eighth Circuit and the Sixth Circuit. See, *EEOC* v. *Hickey-Mitchell Co.,* 507 F. 2d 944 (8th Cir. 1974) and *EEOC* v. *Kimberly-Clark Corp.,* ..... F. 2d ....., 10 FEP Cases 38 (6th Cir. 1975).

Further, the EEOC appears regularly not only to fail to give this required § 1601.23 notice, but also to treat the whole conciliation process as a cursory matter, requiring it to make no more than a

Second, the statutory scheme of Title VII charges the judiciary not merely to oversee but affirmatively to shape the development of the Commission's administrative procedures in carrying out its responsibilities. Thus, unlike the National Labor Relations Act, which empowers the NLRB to prevent unfair labor practices by means of cease and desist authority and which provides only for appellate enforcement and review of the Board's decisions,[5] Title VII authorizes the EEOC only to in-

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perfunctory effort at settlement. This practice has been severely criticized by the lower courts as depriving EEOC respondents of procedural fairness at the most important stage of the administrative proceeding. *EEOC* v. *Firestone Tire & Rubber Co.*, 366 F. Supp. 273 (D. Md. 1973); *EEOC* v. *Wastvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974); *EEOC* v. *McLean Trucking Co.*, ... F. Supp. ....., 7 FEP Cases 302 (W. D. Tenn. 1974); *EEOC* v. *Western Electric Co.*, 364 F. Supp. 188 (D. Md. 1974); *EEOC* v. *Raymond Metals*, 385 F. Supp. 907 (D. Md. 1974); *EEOC* v. *U. S. Pipe & Foundry Co.*, 375 F. Supp. 237 (N. D. Ala. 1974).

Contrary to the view taken by the Fifth Circuit hereinbelow, permitting the EEOC to avoid serious conciliation efforts under Title VII, the Eighth Circuit has refused to allow the Labor Department to engage in similar derelections when an employer is charged with age discrimination as opposed to race, sex, religious or national origin discrimination. *Brennan* v. *Ace Hardware Co.*, 495 F. 2d 368 (8th Cir. 1974). Whether, in view of the primacy placed upon conciliation by Congress under both Title VII and the ADEA, conflicting standards may continue to be employed in the administration of the nation's antidiscrimination laws, is an issue which should be resolved by this Court.

Finally, despite the fact that this Court has once declined to consider whether § 706(f)(1) imposes a time limitation within which the EEOC must investigate a charged violation of the Act, seek to conciliate and bring suit, *EEOC* v. *Cleveland Mills*, 502 F. 2d 153 (4th Cir. 1974) *cert. denied*, ... U. S. ..... (1975), it is an issue which has been widely litigated, has divided the district courts, and caused Judge Moore to dissent below. See, *EEOC* v. *Kimberly-Clark*, *supra*, at n. 5 and cases cited therein. See also, dissent of Judge Moore in the instant case. For the reasons set forth in part B of the Chamber's brief, whether the Act grants the EEOC the right to bring suit *in perpetuity* is an issue which severely impacts upon the administration of the Act, affecting the rights of respondents and charging parties as well, and should be considered by this Court.

5. National Labor Relations Act, as amended, 29 USC § 160 (a), (e) and (f).

vestigate and prosecute. The judiciary must determine in the first instance whether there has been a violation of the Act.[6] Since, under Title VII, the Commission must investigate a charge, make a "reasonable cause" determination based on that investigation, and attempt to conciliate as prerequisites to bringing suit, whether these administrative steps have been taken in conformity with the Congressional intent and with the EEOC regulations and whether the Act places any time-bar on the Commission's authority to bring actions must be determined by the courts.[7] The Commission's failure to adopt standards of fairness or even to adhere to its own regulations at the administrative level severely impacts upon the rights of those charged with violations of the Act.[8] Because of this impact, set forth more fully below, and because of the division and disarray among the district and circuit courts in providing guidance with respect to the administrative and procedural issues presented herein, there is a need for resolution of these issues by this Court.

A. The EEOC Has Failed to Implement Standards and Procedures for the Proper Administration of Title VII.

The instant case demonstrates the EEOC's failure to adhere to standards of fairness and due process at virtually every stage of the administrative proceeding. Consideration of the EEOC's

6. § 706f(1)-(5), 42 USC [Supp. II, 1972] § 2000e-5f(1)-(5).

7. The statutory scheme of the act authorizes the district courts, as trial courts, to engage in direct review of the sufficiency of the EEOC administrative steps leading up to civil action. See *EEOC* v. *U. S. Pipe & Foundry Co., supra; EEOC* v. *Western Electric Co., supra; EEOC* v. *du Pont Co.*, 373 F. Supp. 1321 (D. Del. 1974).

8. This Court has held that agency rules must be scrupulously observed where they are intended to confer important benefits upon individuals. *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532, 538-9 (1970). Here, among other derelictions catalogued in part A of the Chamber's brief, the EEOC failed to give the Petitioner the notice required by § 1601.23 of its regulations, a rule specifically designed to afford EEOC respondents a final opportunity to resolve the charge prior to litigation. See, *e.g., EEOC* v. *Firestone Tire & Rubber Co., supra; EEOC* v. *Western Electric Co., supra; EEOC* v. *Hickey-Mitchell Co., supra.*

conduct with respect to the issues raised by Petitioner here confirms the EEOC's failure to conform its standards and procedures with the design of Congress.

Since the Act follows a progression from investigation to "reasonable cause" determination, conciliation and court action, it is appropriate to proceed to examine the EEOC's conduct in that order.

1. Investigation and the "Reasonable Cause" Determination.

Section 706(b) of the Act[9] provides in relevant part:

> "Whenever a charge is filed . . . the Commission . . . *shall make an investigation thereof* . . . If the Commission determines *after such investigation* that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . If the Commission determines *after such investigation* that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference conciliation, and persuasion." (Emphasis supplied)

Here, the Commission completely failed to adhere to the mandate requiring it make its "reasonable cause" determination on the basis of an investigation of a charged violation of the Act. The practices over which the Commission found "reasonable cause" were not even alleged in the charge under investigation. They were not even investigated, nor was the Petitioner given an opportunity to present any evidence concerning those practices prior to the Commission's determination.

Ben Thomas, a black man, who filed the EEOC charge which led to this proceeding, was discharged by the L & N for falsifying his employment application with respect to questions concerning prior injuries and his involvement in lawsuits. (App. 59) After an investigation, the EEOC's District Director deter-

9. 42 USC [Supp. II, 1972] § 2000e-5(b).

mined that Thomas' race was *not* a factor in his discharge. (App. 60) The Commission adopted its Director's conclusion that Thomas had *not* been discharged because of his race. Nonetheless, without the benefit of a charge and without the evidentiary results of an investigation into the L & N's pre-employment use of testing or arrest record information, the EEOC concluded that there was "reasonable cause" to believe that those practices violated the Act! (App. 39)[10]

Thus, the EEOC's "reasonable cause" determination, its subsequent conciliation demand and the instant suit were a result here not of an evidentiary investigation, but were based on a presumption of guilt growing out of a charge which it found to have no merit and which it dismissed.

This practice is not unique. It is a consequence of the Commission's use of presumptions rather than evidence in the investigation of charges, the failure to adhere to a meaningful and consistent standard of what constitutes "reasonable cause" and a propensity to use isolated charges as a springboard to launch a search into every possible employment practice in order to uncover some violation of the Act.[11] Thus, William A. Carey, former EEOC General Counsel, admitted before the House Subcommittee on Equal Opportunities, that prior to the 1972 amendments granting the EEOC prosecutorial power—when

10. In this regard, it is interesting to note that the only two persons ever discharged by the Company for falsifying the arrest record inquiry were white. (App. 64) The Commission found no evidence that any blacks or whites had ever been refused employment because of a prior arrest record. Moreover, had the EEOC given the L & N an opportunity to present evidence on this issue prior to making its determination, it would have learned that the arrest inquiry had been discontinued in 1970. The Commission issued its "reasonable cause" determination on January 28, *1972*. (App. 56, 63-66)

Similarly, the Commission found no evidence to suggest that any applicant had been denied employment as a result of the use of pre-employment tests as administered by L & N.

11. See e.g., *EEOC* v. *Western Electric Co., supra; EEOC* v. *Westvaco Corp., supra; EEOC* v. *McLean Trucking Co., supra.*

the instant "reasonable cause" determination was made—the Commission employed a *lower* standard to determine "reasonable cause" than it would have employed had the agency had to go to court to enforce its determination.[12] Further, it is not altogether clear whether the difference in standards has been eliminated today.[13] Moreover, former EEOC Chairman Powell told the Committee that it was, and continues to be, the Commission's policy to investigate charges "broadly encompassing non-alleged as well as alleged violations, issues, etc,"[14]

Under a charge-based system such as Title VII, it is neither efficient nor appropriate for the Commission to engage in a broad range purge of all possible or imagined violations of the Act,[15] particularly where, as here, the EEOC, acting in disre-

12. Testimony of William A Carey. *Hearings Before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor,* held on September 17-19, 1974 (G. P. O. 1975) at 43; hereinafter *"Hearings"*.

13. Testimony of Mr. Carey in response to Congressman Hawkins, *Id.,* at 44.

14. Mr. Powell reported that prior to August, 1973, it was the Commission's policy to expand the scope of the investigation of *all* charges filed with it, but that after that date this policy was discontinued where there is only one charge pending against a respondent. *Hearings, supra,* at 33. However, Chairman Powell further reported to the Committee that the Commission is currently developing a *standardized* "request for information" *package* to be used in the investigation of charges, *Hearings, supra,* at 34, which by definition must inquire into areas unrelated to specific charges, and the Chamber's members report that expansion of charges into broad-based investigations, requiring them to supply mountains of data unrelated to the particular charge under investigation, is the rule rather than the exception. See Statement of Homer L. Deakins on behalf of the Chamber, *Hearings, supra,* at 185, *et seq.*

15. Indeed, the Act itself, through the mechanism of the Commissioner's charge, prescribes a statutory means for the Commission to investigate a broad range of practices where, as a result of a number of individual charges, or based on an examination of EEO-1 reports, or upon other independent evidence, an EEOC Commissioner is given "reasonable cause to believe" that an employer might be engaged in broad-based violations of the Act. See *New Orleans Public Service, Inc.* v. *Brown, et al.,* 507 F. 2d 160 (5th Cir. 1975). Here, however, the Commission had before it one individual

gard of the literal mandate of § 706(b), made the determination to do so without any evidentiary basis and without even giving the employer the opportunity to disabuse the agency of its presumption of guilt. Such practices themselves smack of a denial of administrative due process, yet their consequences are more keenly felt at the "conciliation" stage where the employer is then called upon to eliminate the employment practices so determined by the Commission to be violative of the Act.

2. Conciliation.

Section 706(b) of the Act provides that if the Commission finds "reasonable cause", it "*shall* endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation and persuasion." (Emphasis added) This directive is mandatory, requiring the Commission's most serious efforts at resolution since conciliation is the cornerstone of the Act.[16]

Here, however, the Commission has disregarded the Congressional mandate as well as its own regulations requiring it to make serious efforts at conciliation.

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charge which it dismissed and no evidence to support its finding that any other L & N practice might have violated the Act.

16. See, *e.g., EEOC* v. *Hickey-Mitchell, supra; EEOC* v. *U. S. Pipe & Foundry, supra; EEOC* v. *Westvaco Corp., supra; EEOC* v. *Firestone Tire & Rubber Co., supra; EEOC* v. *Western Electric Co., supra; EEOC* v. *Raymond Metals, supra.*

In giving the EEOC prosecutorial power, Congress reaffirmed its statutory directive that the Commission utilize its most serious efforts to seek conciliation. Congressman Perkins, the House sponsor of the bill to give the Commission the authority to bring suit, stated:

> "The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. *Only if conciliation proves to be impossible* do we expect the Commission to bring action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (1972). (Emphasis added)

See also, similar remarks of Senators Dominick, 118 Cong. Rec. 120, 170 (1972) and Williams, 118 Cong. Rec. 3461 (1972).

Here, the Commission, after presenting the Petitioner with a "boiler-plate" proposed conciliation agreement, simply abandoned all efforts at actual conciliation, failed to give the notice required by § 1601.23 of its rules, peremptorily notified the charging party that a satisfactory settlement had not been reached,[17] and thereafter, brought suit. The EEOC's pattern of conduct here is not dissimilar from other cases.[18]

Conciliation, meaningful and not perfunctory, including the requirement that an EEOC respondent be given the opportunity to settle contemplated by § 1601.23, is mandated by statute and agency rule. The Labor Department, in administering charges of age discrimination under the ADEA, is directed to engage in genuine settlement efforts as a jurisdictional prerequisite to the institution of court action. *Brennan* v. *Ace Hardware Co., supra.* The Congressional emphasis on meaningful conciliation is the same under both the ADEA and Title VII. Indeed, both the literal language of Title VII and the ADEA and the Congressional debates confirm the similitude between the two acts in this regard. Thus, § 706(b) of Title VII states that the Commission "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion" and § 706f(1) requires conciliation as a pre-condition to suit.

The language of § 706(b) and the requirement of § 706(f)(1) is virtually identical to § 7(b) of the ADEA, 29 USC § 626(b), which provides:

> "Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion."

Moreover, Congressman Perkins' statement as to the Congressional intent with regard to conciliation under Title VII[19] is

17. App. 40, 67-68.
18. See cases cited at fn. 16, *supra.*
19. See fn. 16 of the Chamber's brief, *supra.*

echoed by the statements of legislative design under the ADEA. Thus, the House Report states:

> "It is intended that the responsibility for enforcement vested in the Secretary by section 7, be *initially and exhaustively* directed through informal methods of conciliation, conference, and persuasion and *formal methods applied only in the ultimate sense.*" House Rept. No. 805, 90th Cong., 1st Sess., U. S. Cong. & Adm. News 2213, 2218 (1967). (Emphasis added)

Similarly, Congressman Reid in the House debate on the ADEA pointed out the importance attached to serious conciliation efforts:

> "This approach *emphasizes* conciliation, conference and persuasion *before* permitting the Secretary of Labor to move directly to the U. S. district courts in a civil action." 113 Cong. Rec. 34745 (1967). (Emphasis added)

Because of the clear Congressional focus on the development of non-judicial remedies under both Title VII and the ADEA and the emphasis placed upon conciliation as the means for achieving compliance with these acts, the incompatibility of standards which now exists as a result of the decision below requires rectification by this Court.

3. The Authority to Bring Suit.

In his dissent below, Judge Moore stated that § 706(f)(1), by its express terms, sets forth an orderly progression for the processing of unfair employment charges through and including the filing of an EEOC action within 180 days (six (6) months), leaving the charging party a private right to sue should the Commission choose not to do so.[20] The limitation urged by Judge

20. § 706(f)(1) provides in pertinent part:

"If within thirty days after a charge is filed . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . If . . . within one hundred and

Moore, as well as other judges who have confined the Commission's right of action to 180 days,[21] promotes Congressional emphasis on conciliation and the statutory scheme which seeks to avoid duplicative lawsuits by providing for EEOC intervention should the charging party bring an action, or by the charging party should the EEOC bring an action.[22] Thus, conciliation, the Congressionally preferred means of implementing the Act, is rendered effective because an EEOC respondent is aware that failure to settle will result in imminent litigation. Multiple, lengthy or avoidable lawsuits which are contrary to the design of the Act are avoided by the imposition of the logical limitation contained in § 706(f)(1).

Here, the Commission did not bring the instant action until *thirty-seven (37)* months after the administrative charge was filed. The Commission argues that once a charge is filed, it never loses its authority to bring suit; that the Act permits the Commission to retain the right to sue in perpetuity, subject only to the ninety (90) day period within which the charging party may exercise his right to bring private action. According to the Commission, its right to sue "reverts" back if the charging party fails to bring his own action.[23] The Commission's con-

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eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person . . . and within ninety days after . . . such notice a civil action may be brought against the respondent . . . by the person claiming to be aggrieved."

21. *E.g., EEOC* v. *General Dynamics Corp.*, 382 F. Supp. 59 (N. D. Tex. 1974); *EEOC* v. *Union Oil Co. of California*, 369 F. Supp. 579 (N. D. Ala. 1974).

22. § 706(f)(1).

23. The Commission formerly took the position that its right to bring action co-existed along with that of the charging party during the statutory ninety (90) day period within which the charging party may bring his own suit. However, this interpretation of its authority has been rejected as being contrary to the Congressional prohibition against duplicative lawsuits, *EEOC* v. *Missouri Pacific R. R. Co.*, 493 F. 2d 71 (8th Cir. 1971), and the Commission now seeks to

struction of the Act places an anomolous "zigzag" in the otherwise orderly and efficient procedure established for administering and enforcing Title VII. The Commission's theory vitiates the Congressional emphasis on conciliation and permits multiple lawsuits. Any incentive which the most recalcitrant or even a cooperative employer has in conciliating a Title VII charge is removed by the Commission's view of the Act. Thus, a recalcitrant employer, knowing he is under no time limitation to settle, has no pressure to come to terms with the Commission or charging party. He can "wait out" the ninety (90) day period within which the charging party may exercise his right to sue and then challenge the EEOC if and when it decides to bring action. An employer who desires to settle all accounts with both the charging party and the EEOC is forced to deal separately with the charging party should he exercise his right to sue and then, perhaps, years after the charge has been filed, as in this case, resume conciliation or defend against an EEOC action.[24] The Commission's approach emphasizes litigation rather than conciliation and allows, if it does not affirmatively encourage, duplicitous lawsuits, contrary to the efficient and effective implementation of the Act.

The Court should grant the petition herein to determine whether the Commission's interpretation of its authority is contrary to the Congressional intent which underlies Title VII.[25]

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gain acceptance of the "reverter" theory urged herein in order to retain its right to sue *ad infinitum*.

24. *EEOC* v. *Kimberly-Clark Corp., supra,* and *EEOC* v. *Huttig Sash & Door Co.,* ..... F. 2d ....., 10 FEP Cases 529 (5th Cir. 1975) wherein the Sixth and Fifth Circuits recently held that despite the filing of private actions by the charging parties, the Commission might nonetheless bring its own action where it alleges practices uncovered in the investigation of the charge other than those sued upon by the charging party in his private action.

25. The instant case, as well as the other examples cited herein, demonstrate that the Commission's delay in bringing suit well past 180 days is the rule rather than the exception. These delays adversely impact upon employers who desire prompt resolution of the charges made against them and who continue to incur potential back-

B. Affected Employers and Employees Need to Have These Issues Resolved.

The impact of the EEOC's failure to follow standards, procedures and time limitations which would result in the effective and efficient implementation of the Act, is borne out by a backlog of EEOC charges exceeding 97,000,[26] 90% of which are in the investigative and pre-investigative stages.[27] Moreover, 90% of the cases investigated and transmitted to the General Counsel for litigation have been rejected because of the quality of the investigations.[28]

Translated into human terms, these figures mean that those who seek relief from the Commission are not getting it, and employers charged with violations of Title VII are not receiving thorough and fair treatment at the administrative level.[29]

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pay liability until the issue of liability is determined by the courts. In *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969) this Court felt that this consideration was sufficient to warrant review of an NLRB failure, because of administrative delay, to promptly resolve an unfair labor practice matter. While the Chamber disagrees that the result reached in *Rutter-Rex* is appropriate here because of the difference between the authority granted the Board under the NLRA and that granted the Commission under VII, the Chamber contends that the same considerations which warranted review by this Court in *Rutter-Rex* compel that *certiorari* be granted in this case to review not merely a single instance of administrative delay but a practice of delay which has become the rule with the EEOC.

26. Statement of Chairman Powell, *Hearings, supra* at 31.

27. *Id.*, at 40.

28. *Id.* at 42-44.

29. Close observers of the Commission have commented upon its inability to implement its statutory charge and the necessity for some direction to be given it. Thus, Professor Blumrosen, formerly Chief of Conciliations with the EEOC, has observed that "the moment of opportunity for administrative implementation of the well-developed law of equal employment opportunity is slipping through our fingers. Bureaucratic inertia and a propensity to burden the courts to an unconscionable degree are operating today." A. W. Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy*, 49 Notre Dame L. 46, 58 (1973). Indeed, this result was foreshadowed in an

As indicated by the General Counsel's rejection rate and his admission that a different standard of judging "reasonable cause" is utilized at the administrative level than would be permitted in court, employers are required to conciliate "violations" which could not be maintained in a suit. Thus, the instant case, where the Commission found "reasonable cause" to believe an arrest record inquiry never shown to have adversely impacted upon minorities and *not even in use* when the determination was made, is not atypical of the Commission's practices.[30] Further, it is small wonder that conciliation is often unproductive when employers are required to remedy "violations" which the Commission could not even bring to court for enforcement. Finally, the Commission's need to develop such tortured theories as a "re-

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earlier observation made by Professor Blumrosen wherein, in commenting upon the Commission's view of its own responsibilities, he noted that the EEOC, at the outset, embarked upon a course of "creative interpretation" of the law; viewed the legislative history of the Act not as a guide but as an outer limit; and apparently based this view on the premise that the courts "were available to prevent serious error" and might sustain the EEOC's interpretation of Title VII "partly out of deference to administrators." Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission,* 38 Geo. Wash. L. Rev. 695, 703 (1970). As Professor Blumrosen observed in his later article, *Crossroads,* the Commission's course of conduct has continued to the present, necessitating direction for the effective implementation of the Act.

While the Chamber does not endorse or share all of Professor Blumrosen's recommended means for effective implementation of the Act set forth in his later article, we agree with his view that the Commission is not functioning efficiently and that there is a need for direction and guidance from the courts.

30. There are, in addition to those repetitious instances of conduct challenged by Petitioner herein, many other EEOC practices indicative of the Commission's present course. Illustrative are the Commission's refusal to answer interrogatories propounded to it during the course of litigation, *EEOC* v. *Los Alamos Constructors, Inc.* 382 F. Supp. 1373 (D. N. M. 1974); its attempts to maneuver the scope of litigation to include new matters upon which it did not even make a "reasonable cause" finding or seek conciliation, *EEOC* v. *du Pont Co., supra;* and its efforts to bring suit against parties with whom conciliation was never even sought, *EEOC* v. *U. S. Pipe & Foundry, supra.* EEOC respondents, many of whom do not have the resources to challenge the Commission's processes, need to know whether such practices as these and those challenged herein will continue to employed.

verter" authority to bring suit is apparent when one considers that it has over 97,000 charges in backlog over which it desires to retain the right to sue when those charges are ultimately "investigated."

Employers and charging parties alike need to know whether the Commission will be required to efficiently and fairly implement its statutory responsibility. The Court should grant *certiorari* to resolve the issues presented herein and satisfy that need.

CONCLUSION.

For the reasons set forth herein as well as those urged by Petitioner L & N, the Chamber respectfully prays that the Court grant *certiorari* to review the questions presented by the petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

On July 16, 1973, the Equal Employment Opportunity Commission brought an action against petitioner in the United States District Court for the Northern District of Alabama under Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e-5(f)(1). The complaint alleged that petitioner engaged in discriminatory employment practices by hiring and classifying employees on the basis of race. It sought an injunction against those practices and an award of back pay for identifiable victims of the company's unlawful discrimination.

On petitioner's motion, the district court entered an order staying further proceedings for 60 days to permit further efforts at voluntary compliance. Those efforts were unsuccessful.

Upon expiration of the stay, petitioner filed a motion to dismiss the complaint. It argued (1) that, since the only administrative charge against the company had been filed with the Commission on April 27, 1970, the Commission's suit was barred by the 180-day statute of limitations which, it alleged, was implicit in Section 706(f); and (2) that the complaint should be dismissed because of the Commission's alleged failure to comply with its regulation, 29 C.F.R. 1601.23, which requires, under certain circumstances, that the Commission notify a respondent that conciliation efforts have been unsuccessful and that those efforts will not be resumed unless the respondent makes a timely written request.

The district court granted the motion and dismissed the Commission's complaint on both of the grounds asserted by petitioner (Pet. App. 36-44). The court of appeals (with one judge dissenting) reversed (*id.* at 20-35). It held that the Commission's authority to file suit is not limited to 180 days from the filing of the administrative charge (*id.* at 21-30) and that the Commission's notice to petitioner that conciliation had failed "was completely adequate and in conformity with" the only applicable regulation, 29 C.F.R. 1601.25 (*id.* at 30).

1. Petitioner's contention (Pet. 11-15) that Section 706(f)(1) imposes a 180-day limitation on the Commission's right to sue if conciliation attempts are unsuccessful has been correctly rejected by every court of appeals that has addressed the issue. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F. 2d 153 (C.A. 4), certiorari denied, February 24, 1975, No. 74-607; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 10 FEP Cases 38 (C.A. 6); *Equal Employment Opportunity Commission* v. *General Dynamics Corp.*, 510 F. 2d 382 (C.A. 5), pending on petitions for writs of certiorari, Nos. 74-1378, 74-1444; *Equal Employment Opportunity Com-*

mission v. *E.I. duPont de Nemours & Co.*, C.A. 3, No. 74-1677, decided May 9, 1975; *Tuft* v. *McDonnell Douglass Corp.*, C.A. 8, No. 74-1890, decided May 27, 1975. We fully stated our views with respect to this issue in our Memorandum in Opposition to the petition for a writ of certiorari in *Cleveland Mills*, and we rely here on that Memorandum.[1]

2. Petitioner contends (Pet. 7-11) that it was entitled to notice under 29 C.F.R. 1601.23 that conciliation efforts had failed and that those efforts would not be resumed except upon timely written request. But Section 1601.23 applies by its terms only when "a respondent fail[s] or refuse[s] to confer with the Commission or its representative, or fail[s] or refuse[s] to make a good faith effort to resolve any dispute."[2] This is not such a case. Petitioner engaged in good faith conciliation efforts that did not result in voluntary compliance.

The applicable notice requirement in circumstances such as those here is contained in 29 C.F.R. 1601.25(a), which provides that "[i]n any instance in which the Commission is unable to obtain voluntary compliance * * *, it shall so notify the respondent * * *."[3] The court

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[1]We have sent a copy of the Memorandum to petitioner's counsel.

[2]Section 1601.23 provides:

> *Refusal of respondent to cooperate.* Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

[3]Section 1601.25 provides in pertinent part:

> *Notice to respondent, person filing a charge on behalf of the aggrieved person and aggrieved person.* (a) In any instance in

of appeals correctly found (Pet. App. 30), and petitioner concedes (Pet. 10), that the Commission complied with the provisions of Section 1601.25.

The decision in *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), relied upon by petitioner, is inapposite. Section 1601.23 was applicable there because the respondent expressly "declined to engage in conciliation with the Commission" (507 F. 2d at 946). Similarly, in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, there had been no attempt to conciliate with respect to one of several charges. Even so, the court of appeals held that the Commission's failure in those circumstances to provide the notice ordinarily required by Section 1601.23 was harmless error (10 FEP Cases at 45-46).

3. Petitioner also argues (Pet. 16-18) that the Commission's conciliation efforts were inadequate in this case. But that contention was not made in the district court or the court of appeals, and neither court considered it. The issue, therefore, is not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULIA P. COOPER,
Acting General Counsel,
Equal Employment Opportunity Commission.

JUNE 1975.

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which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred * * *.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The Memorandum in Opposition to the Petition for Writ of Certiorari asserts, at page four, that the L&N's contention "that the Commission's conciliation efforts were inadequate in this case" "was not made in the district court or the court of appeals, and neither court considered it."

That assertion is patently erroneous.

The Motion to Dismiss filed by the L&N on November 30, 1973 specifically attacked the sufficiency of the Commission's conciliation efforts in two respects.[1] (Reply App. I). That motion was supported by evidence (Reply App. II) and was clearly considered by the district court. (Reply App. III).

[1]For the convenience of the Court, pertinent portions of the Appendix below, the opinions below and the briefs of the parties are reproduced as Appendices to this Reply brief. Reference to this material will be indicated as (Reply App. ....). Emphasis has been added, where necessary, by italicization.

On appeal, the issue was raised by the L&N in brief (Reply App. IV), was responded to by the EEOC both in brief (Reply App. V) and in oral argument,[2] and was in fact considered by the court of appeals. (Reply App. VI). The issue was again dealt with in the L&N's Petition for Rehearing (Reply App. VII).

The issue of the compliance by the Commission with its duty to conciliate is properly before this Court and is one needful of resolution.

Respectfully submitted,

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[2]At oral argument, counsel for the Commission specifically attempted to deal with *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

CERTIFICATE OF SERVICE

This is to certify that on this 20 day of June, 1975, three true and correct copies of the foregoing Petitioner's Reply Memorandum on the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on Counsel for the Respondent; on the Solicitor General of the United States and on Counsel for the Chamber of Commerce of the United States of America by depositing the same in the United States Mail, with air mail postage prepaid, and addressed to Ms. Debra A. Millenson, Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506; The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and Gerard C. Smetana, Esq., Borovsky, Smetana, Ehrlich & Kronenberg, 2011 Eye Street, N.W., Suite 800, Washington, D.C. 20006.

CHARLES A. POWELL, III

REPLY APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CIVIL ACTION
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	)	73-H-665

MOTION TO DISMISS

. . . .

6. The Equal Employment Opportunity Commission has not been unable through informal means of conference, conciliation and persuasion to eliminate the alleged unlawfully practices or to secure conciliation agreement acceptable to it but on the contrary has *obstinately refused to attempt conciliation within the meaning of the Act;*

7. This action is an equitable action and, because of the plaintiff's failure to comply with its own regulations and its *failure to in good faith seek conciliation* as required by Title VII of the Civil Rights Act of 1964 the plaintiff does not come into this Court with clean hands and may not be allowed to prosecute this action.

. . . .

9. On, to-wit, the 10th day of September, 1973, this Court ordered the plaintiff to undertake to conciliate this matter through its district director; *the plaintiff has failed and refused contumaciously fails and refuses to comply with this Court's* order. The plaintiff being in contempt of this Court may not now be heard to prosecute this action.

REPLY APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CA 73-665-S
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.	)	

AFFIDAVIT OF E. E. HOLCOMB

. . . .

A meeting was arranged in Birmingham, Alabama for March 9, 1972, with EEOC Conciliator Edward J. Kirst. The L&N representatives attending this meeting with Mr. Kirst were Mr. E. H. Key, L&N's District Employment Officer at Birmingham, and Mr. Weas and me, both from Louisville, Kentucky. The purposes of this meeting were to discuss the Ben Thomas case, the Commission's Decision in that case and to commence efforts to resolve our differences with the EEOC by voluntary conciliation as provided by the Civil Rights Act. We pointed out to Mr. Kirst that, since the Director's Findings of Fact had been confined solely to Mr. Thomas' EEOC charge involving his discharge, *L&N had never been accorded the opportunity to present its side of the case to the Commission* beyond that involving Mr. Thomas' discharge. *Mr. Kirst stated that he was bound by the EEOC Decision and that there could be no discussion relating to the reasons or bases of the Commission's Decision.* Mr. Kirst submitted a draft of a written proposal for conciliation which Mr. Weas and I took back to Louisville for necessary consideration by all persons in L&N management. During the meeting on March 9, 1972, Mr. Kirst stated that it would be necessary for the Charging Party, Mr. Ben Thomas,

to sign any conciliation agreement that might be reached, and that this could pose a problem because they were not sure they could locate Mr. Thomas in order to obtain his signature. Mr. Kirst stated to us his version of the points involved as (1) the discharge of the Charging Party, (2) the use of arrest record information, and (3) the use of the pre-employment tests.

On April 4, 1972, Mr. Weas notified Mr. Kirst that his proposal was still under consideration by L&N management and that Mr. Kirst would be advised in writing later as to L&N's decision. *Mr. Weas requested that Mr. Kirst contact him if he had any questions in the meantime.*

The next communication of any nature between EEOC representatives and L&N representatives involved in the handling of the Ben Thomas charge was a letter dated May 31, 1972, from Mr. Wesley N. Harry, Acting District Director of the Birmingham District Office of the EEOC, and a copy of a letter dated May 31, 1972, from Mr. Harry to Mr. Ben E. Thomas, which was an authorization to Mr. Thomas to institute a civil action. Copies of both of these letters are attached hereto, made a part hereof, and are marked as "Exhibit H" and "Exhibit I", respectively. L&N representatives received no other communication of any nature from EEOC representatives pertaining to the Ben E. Thomas charge. Mr. Ben Thomas did not institute any suit against the L&N.

In the course of what we believed to be ongoing efforts at conciliation, the EEOC representatives issued this "right to sue" letter to Mr. Thomas. Such "right to sue" notification, according to my understanding, issues only upon a failure of conciliation or at the request of The Charging Party. We were never notified that the Charging Party had made such a request and it was my opinion that the EEOC had unilaterally terminated conciliation efforts. My opinion was later substantiated by the fact that Mr. Ben E. Thomas has never instituted any civil action against the L&N. *The L&N never received any notice from the EEOC as provided for in EEOC Regulation § 1601.23 (29 CFR 1601.23).*

Nothing further occurred in the handling of the Ben Thomas charge until Civil Action No. 73-H-665 was filed. I requested counsel for the L&N handling this civil action to attempt to obtain a stay in order to permit me and the EEOC District Director at Birmingham, or a conciliator appointed by him, to resume conciliation efforts in the Ben Thomas case. This Court's Order granting such a stay was entered on September 10, 1973, and I learned of the entry of this Order on September 11, 1973, at which time I called Mr. Clarence Bell, EEOC District Director at Birmingham, and offered to make myself available at any time to meet with him or a conciliator from his staff. Mr. Bell stated to me that he or a conciliator from his staff would be willing to engage in such conciliation efforts provided the EEOC lawyers had no objections. Later the same day, Mr. Bell informed me that the EEOC lawyers did object to such conciliation efforts between Mr. Bell's office and me. A copy of my letter of September 12, 1973 to Mr. Bell and a copy of Mr. Bell's letter of September 21, 1973 to me are attached hereto, made a part hereof, and are marked as "Exhibit J" and "Exhibit K", respectively.

/s/ E. E. HOLCOMB

E. E. HOLCOMB

In the United States District Court for the
Northern District of Alabama
(Southern Division)

(CA 73-665-S)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF
v.
LOUISVILLE & NASHVILLE RAILROAD CO., DEFENDANT

(Filed in Clerk's Office, Northern District of Alabama
November 9, 1973)

Report on Conciliation

This report is submitted by the defendant in compliance with the Court's order of September 10, 1973.

. . . .

CONCLUSION

We have regretfully concluded that the plaintiff's attorneys, as opposed to the plaintiff's District Director, have no intention of entering into meaningful conciliation efforts. We suggest that implicit in the Court's order was a requirement that the parties proceed in good faith to attempt conciliation of the matters underlying this action.

. . . .

The defendant remains convinced that there was and still is a high degree of probability that good faith conciliation efforts would prove fruitful. Unfortunately, the present posture of the plaintiff, speaking through its General Counsel, is such that the Court's earlier order has been frustrated and the stay is now at its end.

. . . .

REPLY APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	CA 73-H-665-S
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.	)	

MEMORANDUM OPINION

This cause was heard at the regularly scheduled motion docket on January 4, 1974, on the motion of defendant Louisville and Nashville Railroad Company to dismiss the complaint or in the alternative for summary judgment. Since resolution of the issues raised by this motion requires reference to affidavits and exhibits extrinsic to the complaint, the motion will be disposed of as one for summary judgment. *In ruling on this motion the Court is relying on* (1) the complaint, (2) *the affidavits and exhibits attached to defendant's motion to dismiss and defendant's report on conciliation,* (3) the affidavits and exhibits attached to the Commission's memorandum in opposition to defendant's motion to dismiss, and (4) argument of counsel.

. . . .

DONE this 8th day of January, 1974.

/s/ JAMES H. HOWARD

United States District Judge

REPLY APPENDIX IV

(Brief of L&N in Court of Appeals.)

THE COMMISSION MAY NOT PROSECUTE AN ACTION UNDER § 706(f)(1) WHERE IT HAS FAILED TO COMPLY WITH THE CONDITIONS PRECEDENT OF § 706(f)(1)

In addition to the two grounds relied upon by the district court, the pleadings raised several additional issues, each of which supports affirmance of the judgment below. The Act requires, . . . that the Commission attempt to conciliate with the respondent. While a limited charge was filed in this case (A. 56), the L&N was never accorded an opportunity to respond to the allegations upon which this action is based, *nor have there been any good faith efforts by the EEOC to resolve those issues through conciliation.*

. . . .

The Commission Failed to Seek Conciliation in Good Faith

. . . .

The record in this case clearly discloses repudiation by the Commission of conciliation. While the Commission's District Director and the L&N were, as late as September 11, 1973, seeking to meet to continue conciliation efforts (A. 18) those efforts were frustrated by the "Atlanta Litigation Center" (A. 19). We respectfully suggest that the Commission's unilateral termination of conciliation, its failure to comply with its own regulations relating to conciliation and the posture adopted by its General Counsel when ordered to conciliate clearly show that the Commission has not satisfied, on the facts of this case, the statutory condition precedent to the prosecution of this action.

REPLY APPENDIX V

(Reply Brief of EEOC in Court of Appeals.)

2. *The Facts Of The Commission Investigation And Conciliation Process Are Not Subject To Judicial Review.*

Appellee L&N seeks to have this Court review the factual adequacy of the Commission's investigatory and conciliatory efforts prior to suit. The power of a court to review such efforts is limited to the fact of their occurrence and does not extend to their substance.

REPLY APPENDIX VI

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant-Appellee.

No. 74-1185.

United States Court of Appeals, Fifth Circuit.

Dec. 16, 1974.

Before MOORE*, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge:

. . . .

III. L&N's Other Contentions

[8-10] Defendant offers three other grounds for affirming the judgment below. . . . *L&N also contends* that the Commission did not execute all the steps that are conditions precedent (charge, notice, investigation, finding of reasonable cause, attempted conciliation) to filing suit, and *that the Commission did not seek conciliation in good faith.*

. . . .

REPLY APPENDIX VII

(Petition of L&N for Rehearing in Court of Appeals.)

II.

PANEL DECISION CREATES A CONFLICT IN STANDARDS TO BE APPLIED TO IDENTICAL FUNCTIONS PERFORMED BY DIFFERENT AGENCIES IN ADMINISTERING SUBSTANTIALLY SIMILAR STATUTES.

. . . .

The panel majority did not deal with the dichotomy created by its holding vis-a-vis the parallel provisions of the Age Discrimination in Employment Act. We suggest that there is no sound basis for the creation of incompatible standards where two acts are identical in intent, involve virtually identical terms and differ only in the identity of the enforcer. "Conciliation" as a method of dispute resolution should carry the same meaning and be subject to the same standard without reference to whether the alleged discrimination is predicated on race or age.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner's reply memorandum correctly points out an error in our memorandum in opposition. We stated there that petitioner had not contended in the district court or the court of appeals that the Commission's conciliation efforts were inadequate in this case, and therefore did not discuss the contention. The fact is that petitioner made the contention in both courts.

Though the issue is properly before this Court, it does not warrant review. Petitioner's contention here, as in the court of appeals, appears to be that the Commission failed to engage in good faith conciliation efforts and therefore that the statutory conditions precedent to the filing of a civil action were not satisfied.

Section 706(b) of the Act, 42 U.S.C. (Supp. III) 2000e-5(b), directs the Commission—upon a finding of reasonable cause to believe that a charge of unlawful employment practice is true—to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The only precondition to the filing of a civil action under Section 706(f)(1), however, is that "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" (42 U.S.C. (Supp. III) 2000e-5(f)(1)). In our view, that precondition is satisfied if the Commission has made some effort through conciliation to obtain a satisfactory agreement with respondent. If no such agreement has been reached, the statute does not contemplate judicial review of the adequacy of those efforts.

Since it is undisputed that conciliation efforts were made in the present case and that no acceptable agreement was secured, the jurisdictional prerequisites to the filing of this action were satisfied.

Even assuming that the adequacy or good faith of the Commission's conciliation efforts are a proper subject of judicial review, however, the court of appeals here correctly found that petitioner's challenge to the adequacy of those efforts "is simply not supported by the record" (Pet. App. 31). That factual determination does not warrant review by this Court.

In *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (C.A. 8), on which petitioner relies, the court of appeals found that the Secretary of Labor's conciliation efforts under the Age Discrimination in Employment Act were insufficient to satisfy the statute's precondition to the filing of an action. That Act provides that "[b]efore instituting any ac-

tion under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion" (29 U.S.C. 626(b)). The court of appeals undertook to review the adequacy of the Secretary's efforts to secure voluntary compliance,[1] and it found the efforts inadequate because the compliance officer failed to suggest to the employer that back pay should be provided to the injured applicants, neglected to inform the employer that the file would be referred to the Secretary for possible legal action, and did not give the employer an opportunity to respond to the charges (495 F.2d at 375-376).

We doubt the correctness of the decision in *Ace Hardware*, but it is not, in any event, inconsistent with the present decision. Though the conciliation requirements of the two Acts are similarly (but not identically) worded, their enforcement schemes are different. Compare 42 U.S.C. (Supp. III) 2000e-5 with 29 U.S.C. 626. What may be required in the way of conciliation is not necessarily identical under the two statutes. In any event, petitioner's claim of a conflict rests, at bottom, on its characterization of the Commission's efforts to obtain voluntary compliance in this case as one of adamant resistance to conciliation (Pet. 17), a characterization that the court of appeals correctly rejected as without support in the record.[2]

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[1]The Secretary did not argue in that case that such review would be inappropriate under the Act. We are unaware of any decision by a court of appeals in which that issue was expressly considered and decided.

[2]The Secretary of Labor's field operations handbook for compliance officers, which was introduced into evidence in *Ace Hardware*, provided that the employer should be informed when the case file is referred to the Secretary for possible litigation. EEOC's internal procedure manual provides that no interested party should be informed when the case is referred to the Commission with a recommendation for litigation. That difference in operating procedure by the two enforcing agencies hardly requires resolution by this Court. Either approach might in a particular case advance (or threaten) the prospects of voluntary compliance, and each agency is entitled to follow the course that seems best in light of its experience in administering its Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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